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Supreme Court, U.S.
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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Is the decision of the Court of Appeals for the Second Circuit that the Copyright Act bars virtually any quotation at all from or any fair use of technically unpublished letters of the prominent subject of a biography, even when those letters have previously been publicly disseminated, consistent with this Court's ruling in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Copyright Act and the First Amendment to the United States Constitution?

2. Did the Court of Appeals correctly resolve the question left open by this Court in *Harper & Row* as to what constitutes the taking of "expression" as opposed to use of ideas or facts under the Copyright Act?

3. Is it consistent with the Copyright Clause of and the First Amendment to the United States Constitution for a prior restraint to be entered against publication of a scholarly biography because it contains brief quotations and paraphrases from technically unpublished but publicly disseminated letters?

Parties to the Proceeding

The parties before this Court are those set forth in the caption.[1]

[1] Pursuant to Supreme Court Rule 28.1, we advise the Court that Random House, Inc. is a wholly owned subsidiary of Newark Morning Ledger Co., which is in turn wholly owned by Advance Publications, Inc., which is privately owned by a testamentary trust under the will of S.I. Newhouse and by members of his family. None of Random House's affiliates or subsidiaries are publicly owned.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Random House, Inc. and Ian Hamilton respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this action on January 29, 1987.

Opinions Below

There have been three opinions below in this matter, one by the District Court and two by the Court of Appeals. In chronological order they are:

1. *Salinger v. Random House, Inc. and Ian Hamilton*, 650 F. Supp. 413 (S.D.N.Y. 1986) (Leval, J.) (denying a preliminary injunction) (a copy is in the Appendix to this Petition at A21).

2. *Salinger v. Random House, Inc. and Ian Hamilton*, 811 F.2d 90 (2d Cir. 1987) (Newman, J.) (reversing and remanding with instructions to enter a preliminary injunction) (a copy is in the Appendix at A1).

3. *Salinger v. Random House, Inc. and Ian Hamilton*, 818 F.2d 252 (2d Cir. 1987) (*per curiam*) (denying defendants' petition for a rehearing) (a copy is in the Appendix at A46).

Jurisdiction

This is an action for alleged copyright infringement over which the District Court had jurisdiction under 28 U.S.C. §§ 1331, 1338 (1982). The Court of Appeals had jurisdiction to hear the appeal from the denial of a request for preliminary injunction under 28 U.S.C. § 1292(a) (1982). The opinion and order of the Court of Appeals was entered on January 29, 1987. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied on May 4, 1987, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

Constitutional and Statutory Provisions Involved

Article I, section 8, clause 8 of the United States Constitution provides that:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Section 102(b) of the Copyright Revision Act of 1976, 17 U.S.C. § 102(b) (1982) (hereinafter the "1976 Copyright Act") provides:

> "In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."

Section 107 of the 1976 Copyright Act, 17 U.S.C. § 107 (1982), provides that:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work."

Statement of the Case

In 1983, petitioner Ian Hamilton, a highly respected literary critic for *The London Sunday Times* who had previously written an award-winning biography of the poet Robert Lowell, agreed with Random House to write a biography of J.D. Salinger, the celebrated author of *The Catcher in the Rye*, *Franny and Zooey*, and other fiction. (C.A. App. Vol. I at 95-96, 106)[2] Mr. Salinger opposed publication of any biography about him during his lifetime. (C.A. App. Vol. I at 104) Extraordinarily reclusive in his personal life, his writings have made him an American author of undiminished significance and imperishable interest to the public.[3]

Faced with Mr. Salinger's unwillingness to be interviewed or otherwise to cooperate in the preparation of the biography, Mr. Hamilton looked to other sources in order to prepare the biography. (C.A. App. Vol. I at 97-98) In addition to interviewing people who knew Mr. Salinger, reviewing previously published

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[2] Citations to the Appendix to the Petition will be in the form App. A __; citations to the Joint Appendix before the Court of Appeals will be in the form C.A. App. Vol. ____ at ____.

[3] *E.g.*, "Salinger is probably the most avidly read author of any serious pretensions in his generation." Mizener, Harpers, February, 1959. "Although Salinger pursues privacy with the same passion that some men pursue pleasure, his name bobs up oftener in current literary conversations than that of any American writer — including Hemingway." Newsweek, May 30, 1960. "Among the reasonably literate young and young in heart, he is surely the most read and reread writer in America today, exerting a power over his readers which is in some ways extra-literary." Didion, *Finally (Fashionably) Spurious*, National Review, Nov. 18, 1961, p. 341. "Among contemporary novelists Saul Bellow commands literary influence, Norman Mailer an intellectual following and James Baldwin an intense audience. Only J.D. Salinger can be described as the priest of an underground cult." I. Howe, *Celebrations and Attacks: Thirty Years of Literary and Cultural Commentary* p. 93 (1979). "Salinger is one of the very best living writers [not] merely a good one. Salinger is a victim not of neglect but of our careless, unrecast affection." Romano, *Salinger Was Playing Our Song*, New York Times Book Review, June 3, 1979, p. 11, col. 1. "Salinger may be the most widely read, least prolific author ever." Hoban, *The Salinger File*, New York Magazine, June 15, 1987, p. 38.

biographical accounts, and studying Mr. Salinger's published writings, Mr. Hamilton located letters to and from Mr. Salinger that had been deposited for the use of scholars and the general public in university libraries across the country. (C.A. App. Vol. I at 98) Thirty-six of the letters also had been quoted at length in a bibliography published in 1984. *See* J. Sublette, *J.D. Salinger: An Annotated Bibliography* (1984) (C.A. App. Vol. I at 110-11; Vol. II at 827-38).[4] Mr. Hamilton made use of these letters in writing his biography of Mr. Salinger. (C.A. App. Vol. I at 98) The book was prepared by Mr. Hamilton over a three year period and was scheduled to be published in the fall of 1986 in the United States by Random House and in Great Britain by a different publisher. (C.A. App. Vol. I at 98-100)

When Mr. Salinger obtained a copy of the galleys of the biography in May, 1986, his lawyers contacted Random House and raised questions about the propriety of the book quoting from letters written by him. (C.A. App. Vol. I at 99-107) Mr. Salinger then registered the letters with the Copyright Office. (C.A. App. Vol. I at 9, 108) In response to Mr. Salinger's expressed concern, Mr. Hamilton worked closely with a Random House editor to eliminate almost all quotations, and to ensure that while the facts revealed in the letters were reflected in the biography, the expression was Mr. Hamilton's, not Mr. Salinger's. (C.A. App. Vol. I at 99, 108-09) In this final draft of the biography,[5] quotations from the letters total approximately 200 to 300 words drawn from 79 different letters — an average of less than 3.8 words per letter. (App. A23)

Still dissatisfied with the prospect that an unauthorized biography would be published, and desirous, as he testified, of protecting his personal privacy (C.A. App. Vol. II at 953), Mr. Salinger sought a preliminary injunction. After entering a temporary restraining order, the District Court denied the request

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[4] Excerpts from some of the letters were also published in *Story* Magazine, *The Philadelphia Sunday Bulletin Magazine* and elsewhere. (C.A. App. Vol. I at 236-37, 244, 247-48)

[5] Random House and Mr. Hamilton stipulated that they would not distribute the earlier draft of the biography. (App. A24) The only draft at issue below was the later draft.

for a preliminary injunction. (App. A45) That denial was reversed on an expedited appeal by the Court of Appeals for the Second Circuit. (App. A20) On February 18, 1987, the District Court entered a preliminary injunction. (App. A49-50) After rehearing by the Court of Appeals was denied (App. A48), this petition was filed.

The District Court Opinion

The District Court first turned to the threshold issue of the nature of the material quoted or paraphrased and determined that the "vast majority" of Mr. Salinger's copyrighted material used by Mr. Hamilton was not copyright protected in the first place. (App. A25) "Salinger's letters," the District Court concluded,

> "are full of information about his life upon which the biographer has drawn. Such information is not protected by the copyright. Unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital historical fact for the biographer and belongs in the unprotected categories, so long as the biographer does not overstep permissible limits by taking the author's craftsmanship." (App. A25)

The District Court recognized that "the author's own original image, choice of words, and turn of phrase are protected and there will be infringement (absent justification) when they are appropriated whether by direct quotation or by paraphrase." (App. A27) Having found that some passages of the biography went "beyond the permissible report of a historical fact or an idea and . . . reproduced an image, literary device, metaphor or choice of words that is protected by copyright," the District Court turned to the question of fair use. (App. A29)

The District Court determined that only a few words from approximately thirty of the letters were at issue. After considering each of the fair use factors, the District Court held that

> "Salinger has demonstrated no likelihood of success. To the contrary, I believe the defendants have so far shown their likelihood of success that it is doubtful whether plaintiff prevails on the first factor of the second branch — a showing of fair grounds for litigation. I need not resolve that issue, however, because plaintiff has shown neither irreparable harm nor the balance of hardships tipping decidedly in his direction.
>
> "Hamilton's appropriations of copyrighted expressions are too minimal to subject Salinger to any serious harm. There is no substantial revelation of the copyright protected aspects of his letters. There is no adverse impact on their market value as literature by Salinger.
>
> "The adverse impact on defendants from a preliminary injunction, on the other hand, would be substantial. . . . The book is in print awaiting distribution. The lengthy delays that might result from waiting for appeals and for final trial on the merits might seriously impair the marketability of the book. First publication licenses optioned to *The New York Times Sunday Magazine* would be imperiled. The balance of hardships favors the defendants." (App. A44-45) (Citation omitted)

The District Court discussed the narrower scope of fair use in unpublished works announced by this Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) ("*Harper & Row*"). Concluding that the minimal use of Mr. Salinger's expression did not "impair Salinger's control over first publication of his copyrighted letters or interfere with his exercise of control over his artistic reputation," and based on the court's evaluation of the four fair use factors, the court determined that no injunction should issue. (App. A35, 45)

The court also expressed concern that Mr. Salinger was misusing the injunctive remedies provided by copyright to prevent publication of *any* biography about him:

> "Hamilton's use of copyrighted expression is so minimal, it is difficult to perceive any harm to Salinger. The wound he has suffered is not from infringement of his copyright but from the publication of a biography that trespasses on his wish for privacy. The copyright law does not give protection against that form of injury." (App. A42)

The Opinion of the Court of Appeals

In evaluating the four fair use factors that had been found by the District Court to favor Random House and Mr. Hamilton, the Court of Appeals decided that all but the first, the nature of the allegedly infringing work, weighed on Mr. Salinger's side of the question. Key to the Court of Appeals' decision directing entry of a preliminary injunction against publication of the biography was its holding that this Court's decision in *Harper & Row* established that unpublished works "normally enjoy complete protection against copying any protected expression." (App. A13) The Court of Appeals gave this "special emphasis" in evaluating the claim of fair use. (App. A10)

The Court of Appeals devoted a significant portion of its opinion to criticizing what it perceived as the failure of the District Court to include instances of impermissibly close paraphrase in its analysis of the "amount and substantiality of the portion used," the third fair use factor. (App. A13-14) In fact, the District Court had previously addressed this paraphrase issue and had counted close paraphrase of Mr. Salinger as if it had been quotation.[6] (App. A24)

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[6] The District Court did this by use of an exhibit prepared at the court's request by Mr. Salinger's attorneys. The court annotated the exhibit to identify all direct quotations in red, all impermissibly close paraphrase in yellow, all noncopyrightable material in orange, and all reports of facts and ideas that did not include expression in green and blue. This color coded exhibit demonstrated that the District Court had considered each of those few instances of impermissibly close paraphrase in assessing the "amount and substantiality of the portion used." (App. A47-48)

Petitioners' motion to modify the record on appeal to include the District Court's color coded exhibit (n.6, *supra*) was granted. (App. A48) Nevertheless the petition for rehearing and suggestion of rehearing *en banc* was denied. (App. A48) Although the Court of Appeals acknowledged that the exhibit established that the District Court had "meticulously" analyzed the contested passages with the idea/expression dichotomy in mind (App. A47), the Court of Appeals declined to reconsider its decision. Citing only *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929), for the proposition that an author has a protectible interest in the arrangement of his composition (App. A48), the Court of Appeals did not attempt to explain whether – and to what extent – it disagreed with the District Court's findings about what did and did not constitute impermissibly close paraphrase. Once again, the Court of Appeals made no reference to the fact that virtually all of the Salinger letters had been publicly disseminated and, in some cases, previously published. And, as in its initial opinion, the court did not even consider the possibility that the imposition of a prior restraint on publication, combined with the near absolute prohibition on fair use of technically unpublished material, placed nearly every unauthorized biography or history in legal jeopardy.

REASONS FOR GRANTING THE WRIT

At the heart of this case are issues of recurring and transcendent importance relating to the nature of fair use in the Copyright Act and the interrelationship of that Act to the First Amendment. Since October 3, 1986, a prior restraint has been in effect barring the publication of a biography of J.D. Salinger. Based upon the Court of Appeals' view that there may be virtually no quotation from or fair use of letters written by Mr. Salinger, the public has been deprived of the opportunity to read what the trial court referred to as "a serious, carefully researched biography of an important literary figure," a work of "social and educational value." (App. A35, 40) Whether viewed simply as a matter of statutory interpretation of the scope of fair use under the Copyright Act, or as a question of the interplay of that Act with First Amendment principles, this case raises serious issues well worthy of this Court's plenary review.

I.

The Court of Appeals' Prohibition on the Fair Use of Technically Unpublished Letters is a Serious Distortion of Copyright Law that Threatens Historical Scholarship and is Inconsistent With the First Amendment

Letters are the stuff out of which biographical history is made. As one historian has written:

> "Letters furnish the raw material for the writing of history and sometimes even influence the course of events. Yet unlike written history, letters breathe with vitality and realism. They give a sense of living presence — a feeling almost of being a participant."

H.J. Lang, *Letters in American History* 11 (1982).[7]

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[7] This sentiment has been echoed by another student of biography who has observed that: "Most valuable are the subject's own writings for, of course, no one else can know as much about him as he himself knew." J. Garraty, *The Nature of Biography* 177 (1957). Commenting on the revealing nature of letters, Garraty wrote:

> "All men, however, write letters, and remarkably large numbers of these are preserved. Here again, the material varies tremendously from person to person. What a difference between Theodore Roosevelt's impetuous volubility and Calvin Coolidge's restrained taciturnity! A few days after the assassination of McKinley had elevated Roosevelt to the Presidency, he wrote his close friend Henry Cabot Lodge: 'I must just send you a line . . . for naturally you have been in my thoughts almost every hour of the last fortnight. It is a dreadful thing to come into the Presidency this way; but it would be a far worse thing to be morbid about it. Here is the task, and I have got to do it to the best of my ability.' When Harding's sudden death elevated Coolidge to the Presidency, 'Silent Cal' wrote one of his friends: 'Dear George — I know you are thinking of me. I am all right.' But in every case, a man's letters tell a great deal about his life — either directly or indirectly." *Id.* at 178 (ellipses in original).

The decision of the Court of Appeals imperils the writing of all biography – most particularly the writing of literary biographies. By their nature, those works are histories of the thoughts and ideas of writers, works on the process of imagination of writers. Such works would often be nearly pointless, not to say superficial, if biographers were not permitted to make some fair, if modest, reference to the full range of published and unpublished writings that illuminate the creative process.[5]

The District Court opinion concluded that especially because Hamilton had written "the biography of a powerful writer . . . [t]he history is more lively and true to the extent that it uses Salinger's own sharp images in preference to a neutered description of his thoughts or feelings." (App. A36) "[I]t certainly tells more," Judge Leval observed, "about Salinger to read his acid quip that anyone who has worked for 'a good upholsterer' considers himself qualified to edit a short story anthology . . . than to be told that he resented the presumption of unqualified editors." (App. A36)

The Court of Appeals' opinion disagreed in substance and in spirit with the decision of the District Court. In doing so, it placed biographers and historians in a double bind. On the one hand, their craft requires them to pursue primary sources, such as unpublished letters, because such documents provide unique insights into the experiences, attitudes, and emotions of their subject. *See, e.g.*, Mitgang, *516 Pirandello Letters Donated to Princeton*, New York Times, Dec. 29, 1986, p. C13, col. 1 (reporting on the historical importance of certain unpublished letters and quoting therefrom); Sullivan, *Einstein Letters Tell of Anguished Love Affair*, New York Times, May 3, 1987, p. 1, col. 3 (same); Benedict, *Historians and the Continuing Controversy Over Fair Use of Unpublished Manuscript Materials*, 91 Am. Historical Rev. 859, 870 (Oct. 1986); J. Barzun & H. Graff, *supra*, at 131-33. It is the

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[5] Letters are an especially important source because they provide contemporaneous and "unpremeditated" evidence of historical events. J. Barzun & H. Graff, *The Modern Researcher* 131-33 (1962).

biographer's duty to gather information from sources as yet untouched; otherwise he is relegated to merely rewriting what has already been written.

On the other hand, the Second Circuit's opinion tells biographers that if, like Ian Hamilton, they discover through their own diligence materials that have not been published generally, they are *not* at liberty to quote or convey any of the richness of those materials without facing the risk – perhaps the likelihood – of an injunction. Unlike the District Court, the Court of Appeals had little or no sympathy for the biographer faced with this dilemma:

> "[T]he biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he 'distorts' the expressive content, he deserves to be criticized for 'sacrificing accuracy and vividness.' " (App. A11)

Prior to the opinion below, the courts had given far broader scope to the doctrine of fair use when considering unpublished letters of historical significance. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.04, at 5-34 & n.15 (1986). For example, in *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 468, 279 N.Y.S.2d 51, 58 (Sup. Ct. N.Y. Co.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968), the court noted that:

> "in the case of a prominent figure in the arts, the subject matter of his letters was a legitimate source of biographical material. This is especially so where the letters shed light on his thoughts, opinions, and methods of creativity."

The ruling by the Court of Appeals did not distinguish or even mention the *Hemingway* case – the one precedent most nearly on point. Nor is the opinion limited to letters or unpublished

material of contemporary authors, politicians, or the like. Common law copyright, which applied to all unpublished works before passage of the 1976 Act, was perpetual. All works not published before January 1, 1978 are now, under the new statute, covered by statutory copyright until at least the year 2002. *See* 1 *Nimmer on Copyright* § 5.04, at 5-34; 17 U.S.C. § 303 (1982). Thus even for letters written in the distant past, statutory copyright protection exists. To allow the heirs of William Faulkner, Henry James, Thomas Jefferson, or even Cotton Mather to enjoin in 1987 any use of unpublished material authored by these men stretches copyright protection beyond all reasonable bounds.

The Court of Appeals reached this extreme and unprecedented conclusion by divining from *Harper & Row* a nearly absolute prohibition against any quotation at all from unpublished material. But the Court of Appeals failed to recognize that while in *Harper & Row* this Court found the unpublished nature of a work to be a "key, though not necessarily determinative, factor" in the fair use analysis, 471 U.S. at 554, this Court by no means established an absolute rule against quotation from technically unpublished works. The Court of Appeals ignored the fact that in *Harper & Row* this Court expressly stated that "dissemination of a work may tip the balance of equities in favor of prepublication use." 471 U.S. at 551. In fact, this Court expressly said in *Harper & Row* that the "right not to speak" does not sanction "abuse of the copyright owner's monopoly as an instrument to suppress facts." *Id.* at 559. Yet that is exactly what has occurred here.

At issue in *Harper & Row* was whether The Nation magazine's news article about, and quoting some 300 to 400 words from, former President Ford's then unpublished autobiographical manuscript violated Ford's copyright unless excused under the fair use doctrine. In the course of its ruling, this Court rejected Harper & Row's argument that there could be no fair use of unpublished works. To the contrary, this Court held that "the right of first publication, like the other rights enumerated in § 106, is expressly made subject to the fair use provision of § 107." 471 U.S. at 552.

A crucial aspect of the *Harper & Row* decision was former President Ford's interest in creative control over his unpublished manuscript. The Court said that

> "[t]he period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor . . . . The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term 'news value' to be gained from premature publication of the author's expression." *Id.* at 555.

Because they are finished products, letters, of course, do not even implicate this concern. When they are sent to the recipient, the author has finished the creative process and relinquished physical control.

Another repeated theme in the Court's discussion of the unpublished nature of the manuscript at issue in *Harper & Row* was the commercial value of the right of first publication, a right that the Court found had been interfered with by The Nation's news article that quoted from and preceded the book's publication and that the Court found had supplanted planned serialization in *Time* magazine. None of that is at issue here. At his deposition, Mr. Salinger testified that the letters were of no financial value to him, that he had no plans to publish them, and that he might consider destroying any letters in his possession. (C.A. App. Vol. II at 925, 928-29, 941, 953) Indeed, Salinger's literary agent testified that she had thrown nearly 500 similar letters into the wastebasket. (C.A. App. Vol. I at 273-75) Moreover, the District Court found that due to the *de minimis* nature of the copyrighted expression quoted or paraphrased, the market value of plaintiff's literary property would not be affected in any way. (App. A45) Even the Court of Appeals found that the effect on the market for the copyrighted work — traditionally the most important fair use factor — weighed only "slightly" in Mr. Salinger's favor and agreed with the District Court that "the book would not displace the market for the letters." (App. A18) Thus,

the concern expressed by this Court in *Harper & Row* about the economic effect if conduct such as The Nation's was repeated is not present here.

To the Court of Appeals, "unpublished" meant "unquotable." Thus the Court of Appeals vitiated a critical holding of this Court in *Harper & Row*: that "the right of first publication, like the other rights enumerated in § 106 is expressly made subject to the fair use provision of § 107." 471 U.S at 553.

What the Court of Appeals wholly failed to recognize is the use of copyright in this case to suppress speech. It is not disputed by Mr. Salinger that the letters at issue here are the best – often the sole – source of much important information about his life, his ideas, his opinions, his philosophies and his emotions. (C.A. App. Vol. 1 at 274-75; Vol. II at 931-33) Nor has Mr. Salinger (or the Court of Appeals) taken issue with Judge Leval's conclusion that the Hamilton study is "a serious, carefully researched biography of an important literary figure (of whom little is known)." (App. A35) Indeed, it is plain that Mr. Salinger has used the Copyright Act – so far, successfully – to assure that as little becomes known of him as is possible.

It should thus come as no surprise that the Organization of American Historians stated in a brief *amicus curiae* filed with the Court of Appeals in support of the petition for rehearing that if the opinion below is allowed to stand, "it would severely limit the historical use of archival manuscript material." Or that it more generally has been recognized that "if this precedent-setting case is finally decided in favor of Salinger, the elusive author's influence on future biography, journalism and nonfiction could prove as indelible as his mark on modern fiction." Hoban, *supra*, at 37.[9]

Only review by this Court can avoid that indelible impact resulting from the decision of the Court of Appeals.

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[9] Prior to this case, a number of commentators had warned that a blanket restriction on the quotation of unpublished materials would be inconsistent with the

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II.

The Court of Appeals' Overly Expansive Definition of Expression Impermissibly Included the Report of Facts and Ideas

In *Harper & Row*, this Court described "the controversy between the lower courts in this case over copyrightability" as "a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole." 471 U.S. at 548. Although the Court recognized that "[e]specially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression," the Court declined to reach the issue. *Id.* This case presents an opportunity to address this recurring yet unresolved issue.

The District Court and the Court of Appeals in this case disagreed sharply over the extent of paraphrasing of Mr. Salinger's letters in the Hamilton biography and its legal significance. Both courts, however, agreed that paraphrasing that closely tracked Salinger's copyrighted expression was either infringement or fair use.

The District Court concluded that the "vast majority" of the allegedly infringing material was not protected by copyright because what was used was information about Mr. Salinger's life contained in his letters:

> "Unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital

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Copyright Act and the First Amendment. *See, e.g.*, Francione, *Facing the Nation: Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519, 544 n.137 (1986); Note, *When "Fair is Foul": A Narrow Reading of The Fair Use Doctrine in Harper & Row, Publishers, Inc. v. Nation Enterprises*, 72 Cornell L. Rev. 218, 235, 240-41 (1986); 3 M. Nimmer, *Nimmer on Copyright* § 13.05, at 13-75 n.218 (1986). *See also* Benedict, *supra*, at 870 (effect of strictly limiting fair use of unpublished materials housed in libraries would be "devastating" for "future scholars of recent history").

> historical fact for the biographer and belongs in the unprotected categories, so long as the biographer does not overstep permissible limits by taking the author's craftsmanship." (App. A25)[10]

The Court of Appeals disagreed. It included as one example of impermissible paraphrase Hamilton's treatment of Salinger's observation in a letter that "I suspect that money is a far greater distraction for the artist than hunger." Hamilton entirely rewrote this to attribute to Salinger the view that "Money, on the other hand, is a serious obstacle to creativity." (App. A18 n.5) The structure, sound and phrasing of the Salinger and Hamilton sentences are entirely different. If the Court of Appeals believed this to be one of the most striking examples of close paraphrase, the conclusion is inescapable that the Court of Appeals was protecting ideas, not expression, under the guise of copyright.[11] The Court of Appeals' opinion thus contravenes section 102(b) of the Copyright Act, 17 U.S.C. § 102(b) (1982), which expressly states that copyright protection does not extend to facts or ideas.[12]

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[10] Cliches, statements by others, as well as ideas, the District Court held, should not be "counted" against Random House and Mr. Hamilton. (App. A26-27) By contrast, the Court of Appeals decided that only "in one or two instances" could the portions of the letters allegedly copied be said to lack sufficient creativity to warrant copyright protection. (App. A16) In any event, the meticulous analysis by the District Court demonstrated that cliches and statements by others amounted only to about thirty words.

[11] The effects of the Court of Appeals' overly restrictive definition of paraphrase are not limited to technically unpublished source materials. These new limitations on paraphrase, if not reversed, would make it more difficult to report on previously published works as well, thus further impinging upon the ability of historians to make full and fair use of vital source materials.

[12] The Court of Appeals also concluded that the Salinger letters formed the qualitative heart of Hamilton's biography. (App. A16) In making this qualitative judgment, the Court of Appeals looked to the wrong work. Under the Copyright Act, the proper question is whether Hamilton took the qualitative heart of Salinger's letters. During his deposition, Mr. Salinger stated over and over that his letters had no qualitative heart — that they were essentially reports of unexceptional events and opinions, with no one part being more important than any other. (C.A. App. Vol. II at 934, 940, 942-43, 947-48)

Prior to this opinion the lower courts had long recognized that subsequent authors must be given a wide berth when it comes to conveying factual matters reported by an earlier author because those "wishing to express the ideas contained in the factual work often can choose from only a very narrow range of expression." *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *accord Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d. Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). The Court of Appeals' opinion gives biographers and historians no breathing room at all.

If, as the Court of Appeals has held, a biographer cannot quote or even loosely paraphrase from unpublished materials, he will be forced to resort to increasing levels of abstraction. By necessity, increasing abstraction means increasing imprecision. In fact, Mr. Salinger has contended that if Mr. Hamilton used Mr. Salinger's words, he violated the Copyright Act but if he avoided using Salinger's words, he distorted the expressive contents of the letters and thereby violated the Lanham Act. Although the Court of Appeals dismissed the District Court's perceptive description of this dilemma as a Catch-22, Mr. Salinger's allegations reveal his real (and thus far realized) objective: to prevent the publication of any biography about him in his lifetime. This is hardly the goal of copyright.

III.

Copyright Law and the First Amendment Do not Permit Enjoining a Scholarly Biography to Prevent Brief Quotation from Letters

This Court said in *Harper & Row* that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." 471 U.S. at 546. It concluded that "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 558.

It simply cannot be seriously argued that letters are or are not written depending on the economic incentive embodied in the Copyright Act. Letters are written, as telephone calls are made, for the purpose of communicating. To enjoin a scholarly biography that makes incidental use of letters does not promote "the progress of science and useful arts." U.S. Const. art. I, § 8, cl. 8. Whatever this Court, as well as the court below, decides in this case, people will still write letters, memoranda, diaries, and take notes.[13] But whether the copyright law frustrates progress

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[13] As one historian commented in evaluating the respective merits of autobiography, diaries, and letters as sources for biography:

> "One weakness of both autobiographies and diaries is that they result from a person's self-conscious efforts to record his actions or thoughts for future use of some kind. This is much less true of *letters*, which, in the words of Thomas Jefferson, usually, 'form the only full and genuine journal' of a man's life. Letters generally have the aim of transmitting information from one person to another for some *immediate* purpose. The letter-writer looks outward rather than inward, and is therefore less likely to traffic in rationalizations. This, of course, does not mean that letters tend to be written with greater frankness than more personal records. It means only that the letter-writer is not often (there are exceptions like Theodore Roosevelt) history-minded as he writes. He is concerned

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of the arts by preventing any use of these materials, is very much at issue.

Because unpublished materials have never before the 1976 Act been controlled by federal copyright, this issue could not have arisen before the new act took effect. A construction of the federal Copyright Act that allows the banning and the possible destruction of a scholarly biography because of quotation or paraphrase of approximately 200 words of technically unpublished letters, does not begin to further the purposes of the Copyright Clause. Such a construction would render the Copyright Act constitutionally dubious.

At the same time, such an interpretation of the Copyright Act raises the most serious, and as yet undecided, questions of the relationship of copyright to the First Amendment. This Court has never passed upon the constitutionality of prior restraints in copyright actions. Although prior restraints in virtually every other area of law have been held to constitute "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), prior restraints in copyright have often been routinely issued on a finding of liability. *See New York Times Co. v. United States*, 403 U.S. 713, 731 n.1 (1971) (White, J., concurring).

This case illustrates the problem. The District Court expressed grave concerns about issuance of a preliminary injunction under the facts of this case: "Enjoining publication of a book," it concluded, "is a serious matter." (App. A41) The Court of Appeals disagreed, ordering the entry of an injunction with no deference to the District Court's discretion, no evaluation of Mr. Salinger's supposed irreparable harm, and no reference at all to

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> with the present even more than the diarist, and much more than the autobiographer. Letters show a man in one form of interaction with his contemporaries, and thus offer insights into his personality that more self-centered personal documents do not."

J. Garraty, *supra*, at 195 (emphasis in original, footnote omitted); *see* J. Barzun & H. Graff, *supra*, at 131-33.

the balance of hardships, or the adequacy of money damages. According to the Court of Appeals, if any court decides a seriously disputed copyright question against the user, the user "deserves" to be enjoined without further discussion.

This ruling brings the Copyright Act into direct collision with the First Amendment.

In every previous instance in which a plaintiff has attempted to invoke the copyright laws to prevent the appearance of unauthorized biography or history, the courts have ultimately denied injunctive relief. *See, e.g., Estate of Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 728, 268 N.Y.S.2d 531, 534 (Sup. Ct. N.Y. Co.), *aff'd*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966); *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973); *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, 366 F.2d at 306 (preliminary injunction vacated). Now, for what may well be the first time in the history of American scholarship, an appellate court has countenanced the effort of a public figure to veto publication of a book of which he disapproves.

Historically, this Court has recognized that there are two important safety valves that prevent the property interests protected by copyright law from seriously encroaching upon free expression: the fair use doctrine and the idea/expression dichotomy. *Harper & Row*, 471 U.S. at 556, 560; *see* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283, 299 (1979). The courts have generally taken into account the strong public interest favoring publication of historical works in analyzing these two issues.

> "Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. . . . This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so 'that the world may not be deprived of improvements, or the progress of the arts be retarded.' "

Rosemont Enterprises, Inc. v. Random House, Inc., *supra*, 366 F.2d at 307. *See also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987).

The decision of the Court of Appeals has now tightly sealed both of these safety valves when the copyrighted work is technically "unpublished." The Court of Appeals ignored all prior cases that have recognized that authors of historical and factual works must be given considerable latitude to paraphrase source materials. *See, e.g., Hoehling v. Universal City Studios, Inc.*, *supra*, 618 F.2d at 980. Most disturbingly, in discussing both of these issues – and in the course of directing the issuance of a prior restraint – the Court of Appeals disregarded the public interest in publication of biographical and historical works discussing important public figures. *Cf. Maxtone-Graham v. Burtchaell*, *supra*, 803 F.2d at 1263.[14]

The imposition by the Court of Appeals of a prior restraint on publication in this case is particularly violative of basic First Amendment values. The District Court had found that publication of the biography would have "no effect" on the marketability of the Salinger letters. (App. A39) Even the Court of Appeals conceded that the effect on the market would be slight. (App. A17-18) Nevertheless, in order to prevent only a slight or nonexistent injury to the marketability of technically unpublished letters, the Court of Appeals restrained the publication of a biography of an important public figure.[15] In the past, such a

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[14] Actually, as the District Court perceived, this is not a case of copyright infringement at all. (App. A42) During his deposition, Mr. Salinger candidly admitted that the letters at issue have no value to him as literary property; in fact he suggested that he might destroy similar letters in his possession. (C.A. App. Vol. II at 953) Mr. Salinger also acknowledged that he objects to publication of this biography only because it interferes with his desire for privacy. (C.A. App. Vol. II at 925, 953) As Judge Leval concluded: "The copyright law does not give him protection against that form of injury." (App. A42)

[15] The Court of Appeals ignored all prior authority that had suggested that a prior restraint on publication in circumstances such as these raised serious constitutional questions. In particular, the court below did not mention *Estate of*

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drastic remedy has ordinarily been denied when, as here, plaintiff's damages appear to be trivial or the injunction might work an injury to the defendant out of proportion to the damages that might result to the plaintiff from the failure to issue the injunction. *See, e.g., Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984); *Belushi v. Woodward*, 598 F. Supp. 36 (D.D.C. 1984); *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965); *Consumers Union of United States, Inc. v. Hobart Manufacturing Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960).

Hemingway v. Random House, Inc., supra, 49 Misc. 2d at 728, 268 N.Y.S.2d at 534, a landmark case also involving unpublished letters, which stated:

> "A preliminary injunction is always a drastic remedy and the one seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts. The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its possible impingement upon fundamental democratic and intellectual institutions, it will require a showing by the movant of a right, both legal and factual, in most unequivocal terms."

Rosemont Enterprises, Inc. v. Random House, Inc., supra, 366 F.2d at 309, made a similar point:

> "By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person [Howard Hughes] endowed with extraordinary talents who, by exercising these talents, made substantial contributions in the fields to which he chose to devote his unique abilities. . . .
>
> "Hughes has almost an obsession as to his privacy and his right thereto. However, when one enters the public arena to the extent he has, the right of privacy must be tempered by a countervailing privilege that the public have some information concerning important public figures. . . .
>
> "Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner."

When brief quotations such as these are at issue, the extreme remedy of a prior restraint on publication serves only to exalt the most speculative property interests over the interests of the public. The ruling encourages last minute efforts of disgruntled subjects of biographies to thwart publication. Rather than face the possibility of a prepublication injunction that could destroy a publishing project, publishers may be forced to excise from biographies all quotations and paraphrases derived from technically unpublished materials. *See, e.g.*, Benedict, *supra*, at 870. The result would be to deprive the public of the accuracy, the perceptiveness, the utility and the beauty of historical writing.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
July 31, 1987

Respectfully submitted,

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A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 657—August Term, 1986

(Argued: December 3, 1986 Decided: January 29, 1987)

Docket No. 86-7957

JEROME D. SALINGER a/k/a J.D. SALINGER,
Plaintiff-Appellant.

— v. —

RANDOM HOUSE, INC. and IAN HAMILTON,
Defendants-Appellees.

Before:

NEWMAN and MINER,
*Circuit Judges.**

*Judge Mansfield, originally a member of the panel, died on January 7, 1987. The appeal is being decided by the remaining members of the panel pursuant to Local Rule § 0.14(b).

Appeal from an order of the District Court for the Southern District of New York (Pierre N. Leval, Judge) denying a preliminary injunction sought by plaintiff alleging infringement of copyright in his unpublished letters.

Reversed and remanded with directions to issue a preliminary injunction.

Marcia B. Paul, New York, N.Y. (R. Andrew Boose, Jeremy Nussbaum, M. Graham Coleman, 2d, Kay Collyer & Boose, New York, N.Y., on the brief), for plaintiff-appellant.

Robert M. Callagy, New York, N.Y. (Mark A. Fowler, Satterlee & Stephens, New York, N.Y., on the brief), for defendants-appellees.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue whether the biographer of a renowned author has made "fair use" of his subject's unpublished letters. The issue arises on an expedited appeal from an order of the District Court for the Southern District of New York (Pierre N. Leval, Judge) denying a preliminary injunction sought by the well-known writer, J.D. Salinger, against Ian Hamilton and Random House, Inc., the author and publisher, respectively, of a book about Salinger and his writings. For reasons that follow, we conclude that a preliminary injunction should be issued.

Background

The plaintiff J.D. Salinger is a highly regarded American novelist and short-story writer, best known for his novel, *The Catcher in the Rye*. He has not published since 1965 and has chosen to shun all publicity and inquiry concerning his private life. The defendant Ian Hamilton is a well-respected writer on literary topics. He serves as literary critic of *The London Sunday Times* and has authored a biography of the poet Robert Lowell. In July 1983 Hamilton informed Salinger that he was undertaking a biography of Salinger to be published by Random House and sought the author's cooperation. Salinger refused, informing Hamilton that he preferred not to have his biography written during his lifetime. Hamilton nevertheless proceeded and spent the next three years preparing a biography titled *J.D. Salinger: A Writing Life*.

An important source of material was several unpublished letters Salinger wrote between 1939 and 1961. Most were written to Whit Burnett, Salinger's friend, teacher, and editor at *Story* magazine, and Elizabeth Murray, Salinger's friend. A few were written to Judge Learned Hand,[1] Salinger's friend and neighbor in New Hampshire. Hamish Hamilton and Roger Machell, Salinger's British publishers, and other individuals including Ernest Hemingway.

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[1]Of historical interest is the fact that this is not the first time a prominent jurist has figured in litigation concerning the copyright protection available for private letters. In what was probably the first federal decision concerning a copyright in letters, Justice Story noted that the rights to the published letters of George Washington, which had been extensively copied in a biography, had been obtained by Chief Justice Marshall and Jared Sparks from President Washington's nephew, Justice Bushrod Washington. *See Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901).

Ian Hamilton located most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives. Prior to examining the letters at the university libraries, Hamilton signed form agreements furnished by the libraries, restricting the use he could make of the letters without permission of the library and the owner of the literary property rights. The Harvard form required permission "to publish the contents of the manuscript or any excerpt therefrom." The Princeton form obliged the signer "not to copy, reproduce, circulate or publish" inspected manuscripts without permission.

By May 1986 Hamilton had completed a version of his biography. Salinger received a set of the galley proofs of this version (the "May galleys") and learned from the galleys and the footnote citations to his letters that the letters had been donated to university libraries. In response, he took two actions. First, he registered 79 of his unpublished letters for copyright protection. Second, he instructed his counsel to object to publication of the biography until all of Salinger's unpublished materials were deleted.

In response to Salinger's objection, Hamilton and Random House revised the May galleys. In the current version of the biography (the "October galleys"), much of the material previously quoted from the Salinger letters has been replaced by close paraphrasing.[2] Somewhat more

[2]The closeness of the paraphrasing is illustrated by comparison of a passage from a 1943 letter to Whit Burnett with Hamilton's report of what Salinger had written on that occasion. Salinger, distressed that Oona O'Neil, whom he had dated, had married Charlie Chaplin, expressed his disapproval of the marriage in this satirical invention of his imagination:

> I can see them at home evenings. Chaplin squatting grey and nude, atop his chiffonier, swinging his thyroid around his head by his bam-

than 200 words remain quoted. Salinger has identified 59 instances where the October galleys contain passages that either quote from or closely paraphrase portions of his unpublished letters. These passages draw upon 44 of the copyrighted letters, 20 to Burnett, 10 to Murray, 9 to Hamish Hamilton, 3 to Judge Hand, 1 to Machell, and 1 to Hemingway.[3]

On October 3, 1986, Salinger sued Ian Hamilton and Random House, seeking an injunction against publication of Hamilton's biography and damages. In addition to

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> boo cane, like a dead rat. Oona in an aquamarine gown, applauding madly from the bathroom. Agnes (her mother) in a Jantzen bathing suit, passing between them with cocktails. I'm facetious, but I'm sorry. Sorry for anyone with a profile as young and lovely as Oona's.

Hamilton, not content to report the fact that Salinger was distressed that O'Neil had married Chaplin or that in his mind he imagined how disastrous their life together must be, writes the following:

> At one point in a letter to Whit Burnett, he provides a pen portrait of the Happy Hour Chez Chaplin: the comedian, ancient and unclothed, is brandishing his walking stick—attached to the stick, and horribly resembling a lifeless rodent, is one of Chaplin's vital organs. Oona claps her hands in appreciation and Agnes, togged out in a bathing suit, pours drinks. Salinger goes on to say he's sorry—sorry not for what he has just written, but for Oona: far too youthful and exquisite for such a dreadful fate.

Even the briefest similes are closely paraphrased. Salinger, expressing his unfavorable opinion in 1940 of presidential candidate Wendell Willkie, wrote Burnett: "He looks to me like a guy who makes his wife keep a scrapbook for him." Hamilton reports that Salinger "had fingered [Willkie] as the sort of fellow who makes his wife keep an album of his press cuttings."

[3]The excerpts from the biography complained of by Salinger include one passage that Hamilton has footnoted with a reference to an additional letter to Elizabeth Murray dated December 3, 1941. However, the list of letters to Murray appearing on the copyright registration do not contain such a letter, and the paraphrased excerpt does not appear in any of the letters to Murray included in the record. This discrepancy has no bearing on our disposition of any issue in the appeal.

copyright infringement, the complaint alleged unfair competition and breach of contract. The unfair competition claim was based on instances in the biography where Hamilton uses phrases such as "he states" or "he writes" to introduce close paraphrases of portions of Salinger's letters; Salinger claimed that readers would be deceived into thinking that they were reading Salinger's exact words. The breach of contract claim was based on the form agreements that Hamilton signed with the Harvard, Princeton, and University of Texas libraries. Salinger alleged that he was a third-party beneficiary of those agreements.

Judge Leval granted a temporary restraining order but subsequently issued an opinion denying a preliminary injunction. _ F. Supp. _ . In the District Judge's view, the extent of copying of expressive material entitled to copyright protection was "minimal," amounting to "about 30 instances of the use of a word or a phrase or an image." *Id.* at _ . Building on the premise that only such fragmentary copying of protected material was involved, Judge Leval concluded that "Hamilton's appropriations of copyrighted expressions are too minimal to subject Salinger to any serious harm." *id.* at _. and that such use as Hamilton had made was "fair use" within the meaning of the Copyright Act, 17 U.S.C. § 107 (1982). Judge Leval rejected the unfair competition claim, finding "no showing of distortions that would give rise to a Lanham Act claim." *Id.* at _ . He also rejected the contract claim, concluding that the library agreements are to be construed not to prevent all quotations but only "quotations and excerpts *that infringe copyright.*" *Id.* at (emphasis in original). The claim therefore fell with the conclusion that the infringement claim was defeated by the defense of fair use. Judge Leval also noted that the letters in the Harvard and Texas

libraries had not been directly quoted and that the Princeton form did not expressly forbid quotation.

The District Court granted a limited stay, which this Court extended pending an expedited appeal.

Discussion

Rulings on applications for a preliminary injunction are reviewed under an "abuse of discretion" standard. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 74 (2d Cir. 1985). Misapplication of the appropriate legal principles constitutes grounds for overturning the denial or issuance of a preliminary injunction. See *Parents' Association of P.S. 16 v. Quinones*, 803 F.2d 1235, 1239 (2d Cir. 1986); *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 315 (2d Cir. 1982); *see generally* 7 *Moore's Federal Practice* ¶ 65.04[2] at 65-48-49, ¶ 65.21 at 65-154-57 (2d ed. 1986 & Supp. 1986-87).

To a large extent the appropriate legal principles are not in dispute on this appeal, though their application is seriously contested. The author of letters is entitled to a copyright in the letters, as with any other work of literary authorship. *See Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir.), *cert. denied*, 434 U.S. 1013 (1977); *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901); 1 *Nimmer on Copyright* § 5.04 (1986); W. Patry, *Latman's The Copyright Law* 130 (6th ed. 1986). Prior to 1978, unpublished letters, like other unpublished works, were protected by common law copyright, but the 1976 Copyright Act preempted the common law of copyright, 17 U.S.C. § 301(a), and brought unpublished works under the protection of federal copyright law, which includes the right of first publication among the rights accorded to the

copyright owner. *id.* § 106(3). The copyright owner owns the literary property rights, including the right to complain of infringing copying, while the recipient of the letter retains ownership of "the tangible physical property of the letter itself." 1 *Nimmer, supra*, § 5.04 at 5-32 (footnote omitted). Having ownership of the physical document, the recipient (or his representative) is entitled to deposit it with a library and contract for the terms of access to it. As with all works of authorship, the copyright owner secures protection only for the expressive content of the work, not the ideas or facts contained therein, *see Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976), a distinction fundamental to copyright law and of special significance in determining whether infringement has occurred in a work of biography or other account of historical or contemporary events. *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

Central to this appeal is the application of the defense of "fair use" to unpublished works. Though common law, especially as developed in England, appears to have denied the defense of fair use to unpublished works, *see* W. Patry, *The Fair Use Privilege in Copyright Law* 436-41 (1985), the 1976 Act explicitly makes all of the rights protected by copyright, including the right of first publication, subject to the defense of fair use. *See* 17 U.S.C. § 107. That fair use applies to unpublished works does not determine, however, the scope of the defense as applied to such works. Whatever glimmerings on that subject have appeared in cases decided before May 20, 1985, *see, e.g., Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142 (2d Cir. 1984) (applying fair use to a letter to the editor of a newspaper, which, though not previously printed, was

obviously intended for dissemination); *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985); *Schuchart & Assocs., Professional Engrs., Inc. v. Solo Serve Corp.*, 220 U.S.P.Q. 170 (W.D. Tex. 1983), our guidance must now be taken from the decision of the Supreme Court on that date in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Court's first delineation of the scope of fair use as applied to unpublished works.

The Court begins its discussion of fair use by considering the application of the doctrine to unpublished works. The Court observes that "fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works," *id.* at 550-51 (footnote omitted), but that this "absolute rule" was "tempered in practice by the equitable nature of the fair use doctrine." *Id.* at 551. The Court notes that, under the Copyright Revision Act of 1976, all of the rights protected by copyright, including the right of first publication, are subject to fair use, *see* 17 U.S.C. §§ 106, 107, but explicitly rejects the contention, advanced by *The Nation*, that Congress "intended that fair use would apply *in pari materia* to published and unpublished works." 471 U.S. at 552. "Under ordinary circumstances," the Court states, "the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *Id.* at 555. This proposition was emphasized with respect to unpublished letters. Reckoning with *The Nation*'s argument that fair use could permissibly be made of President Ford's unpublished memoirs because the imminent publication demonstrated that the author has no interest in nonpublication, the Court said, "This argument assumes that the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination," *id.* at

554, an assumption the Court went on to reject. Pertinent to our case is the fact that the Court underscored the idea that unpublished letters normally enjoy insulation from fair use copying.

After emphasizing the insulation of unpublished works from fair use under "ordinary circumstances," the Court considers in turn each of the four factors identified by Congress as "especially relevant," *id.* at 560, in determining whether a use is fair. *See* 17 U.S.C. § 107. Reflecting its earlier discussion, the Court gives special weight to the fact that the copied work is unpublished when considering the second factor, the nature of the copyrighted work. *Id.* at 564.

Following the Supreme Court's approach in *Harper & Row*, we place special emphasis on the unpublished nature of Salinger's letters and proceed to consider each of the four statutory fair use factors. Application of these four factors points in Salinger's favor.

1. *Purpose of the use.* Hamilton's book fits comfortably within several of the statutory categories of uses illustrative of uses that can be fair. The book may be considered "criticism," "scholarship," and "research." *See* 17 U.S.C. 107. The proposed use is not an attempt to rush to the market just ahead of the copyright holder's imminent publication, as occurred in *Harper & Row*. Whether Random House plans to "exploit the headline value of its infringement," *Harper & Row, supra*, 471 U.S. at 561, as *The Nation* did, is not clear on the record thus far developed. Though no evidence has yet been presented on the advertising materials Random House plans to use, it is hard to believe that some emphasis will not be placed upon the fact that the book draws generously upon Salinger's unpublished letters.

We agree with Judge Leval that Hamilton's purpose in using the Salinger letters to enrich his scholarly biography weighs the first fair use factor in Hamilton's favor, notwithstanding that he and his publisher anticipate profits. However, we do not agree that a biographer faces a dilemma that entitles him to a generous application of the fair use doctrine. Judge Leval perceived the dilemma in these terms:

> To the extent [the biographer] quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description.

_ F. Supp. at _ . This dilemma is not faced by the biographer who elects to copy only the factual content of letters. The biographer who copies only facts incurs no risk of an injunction: he has not taken copyrighted material. And it is unlikely that the biographer will distort those facts by rendering them in words of his own choosing. On the other hand, the biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he "distorts" the expressive content, he deserves to be criticized for "sacrificing accuracy and vividness." But the biographer has no inherent right to copy the "accuracy" or the "vividness" of the letter writer's expression. Indeed, "vividness of description" is precisely an attribute of the author's expression that he is entitled to protect.

The point is sharply, though unwittingly, made by defendant Hamilton in the course of his deposition in this case. On cross-examination, he is pressed as to why he

copied a stylistic device that Salinger had employed in one of the letters. He responds: "I wanted to convey the fact that [Salinger] was adopting an ironic term . . . ." When the cross-examiner asks, "Couldn't you have stated that he had an ironic tone," Hamilton replies, "That would make a pedestrian sentence I didn't wish to put my name to." (A-925c).[4] But when dealing with copyrighted expression, a biographer (or any other copier) may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a "pedestrian" sentence. The copier is not at liberty to avoid "pedestrian" reportage by appropriating his subject's literary devices.

In sum, we agree with the District Court that the first fair use factor weighs in Hamilton's favor, but not that the purpose of his use entitles him to any special consideration.

2. *Nature of the Copyrighted Work.* "The fact that a work is unpublished is a critical element of its 'nature' ". *Harper & Row, supra,* 471 U.S. at 564. Salinger's letters are unpublished, and they have not lost that attribute by their placement in libraries where access has been explicitly made subject to observance of at least the protections of copyright law. In considering this second factor, we encounter some ambiguity arising from the Supreme Court's observation that "the *scope* of fair use is narrower with respect to unpublished works." *Id.* (emphasis added).

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[4]This was not an ill-considered slip of the tongue. Pressed as to why he closely paraphrased Salinger's comment that Wendell Willkie "looks to me like a guy who makes his wife keep a scrapbook for him" instead of just reporting that he thought Willkie was vain, Hamilton replied, "Because that is, again, laborious, pedestrian." To avoid the "pedestrian," Hamilton reported Salinger's expression that Willkie was "the sort of fellow who makes his wife keep an album of his press cuttings."

This could mean either that the circumstances in which copying will be found to be fair use are fewer in number for unpublished works than for published works or that the amount of copyrighted material that may be copied as fair use is a lesser quantity for unpublished works than for published works. Some support for the latter view can be derived from the statement in *Harper & Row* that, though "substantial" quotations might be used in a review of a published work, the author's right to control first publication weighs against "such use" prior to publication. *Id.* However, we think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower "scope" seems to refer to the diminished *likelihood* that copying will be fair use when the copyrighted material is unpublished.

The District Judge considered the nature of the copyrighted work, especially its unpublished nature, primarily in rejecting the plaintiff's argument that fair use was inapplicable to unpublished works. However, in analyzing and weighing the fair use factors, Judge Leval gave no explicit consideration to this second factor. Since the copyrighted letters are unpublished, the second factor weighs heavily in favor of Salinger.

3. *Amount and Substantiality of the Portion Used.* It is with regard to this third factor that we have the most serious disagreement with the District Judge's legal analysis, both as to the pertinent standard and its application. As to the standard, we start, as did Judge Leval, by recognizing that what is relevant is the amount and substantiality of the copyrighted *expression* that has been used, not the *factual content* of the material in the copyrighted works. However, that protected expression has been "used"

whether it has been quoted verbatim or only paraphrased. *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); 3 *Nimmer, supra*, § 13.03[A] at 13-20.1. We cannot be certain that Judge Leval included close paraphrases of the Salinger letters in his determination of the quantity of copyrighted material that has been used in the Hamilton biography. At one point in his decision, Judge Leval states that he has identified "approximately 30 letters from which Hamilton has taken, either by brief quotation or *paraphrase*, a few works of copyright protected material." _ F. Supp. at _ (emphasis added). At other points, however, his opinion suggests that only direct quotations have been counted. Noting that Hamilton had revised the May galleys "by eliminating and writing around most of the quoted matter" previously appearing in that version of the book, Judge Leval concluded that what Hamilton accomplished "was to reduce from a large number to fewer than 30 the instances of use of copyrighted expression." *Id.* at _ . This strongly suggests that passages quoted in the May galleys but paraphrased in the October galleys were not counted as instances of use of copyrighted expression. Moreover, of the 59 passages of the Hamilton biography complained of by Salinger, 24 contain direct quotations from the letters, perhaps constituting the "fewer than 30" instances the District Judge had in mind. Furthermore, Judge Leval states, "In the rarest case, a complete sentence is taken." *id.* at _, citing to a passage in the October galleys that contains a full sentence quoted from one of Salinger's letters. If the District Judge had included paraphrases, he would have noticed numerous instances where the quantity of material taken from a single letter greatly exceeded a single sentence.

Even if Judge Leval included paraphrases, we conclude that he misapplied the governing standard in determining

the number of instances in which Hamilton has used Salinger's copyrighted expression. The District Judge rejected Salinger's claim of infringement as to several passages of the letters because they "employ[ed] a cliche or a word-combination that is so ordinary that it does not qualify for the copyright law's protecion." *Id.* at _ . Though a cliche or an "ordinary" word-combination by itself will frequently fail to demonstrate even the minimum level of creativity necessary for copyright protection, *see, e.g., Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972); W. Patry, *Latman's The Copyright Law, supra*, at 23-24, such protection is available for the "association, presentation, and combination of the ideas and thought which go to make up the [author's] literary composition." *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929). Or as we have more recently stated, "What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words and the emphasis he gives to particular developments." *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The "ordinary" phrase may enjoy no protection as such, but its use in a sequence of expressive words does not cause the entire passage to lose protection. And though the "ordinary" phrase may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase.

In almost all of those instances where the quoted or paraphrased passages from Salinger's letters contain an "ordinary" phrase, the passage as a whole displays a sufficient degree of creativity as to sequence of thoughts,

choice of words, emphasis, and arrangement to satisfy the minimal threshold of required creativity. And in all of the instances where that minimum threshold is met, the Hamilton paraphrasing tracks the original so closely as to constitute infringement.

We have carefully analyzed all 59 of the passages from Hamilton's book cited by Salinger as instances of infringing copying from 44 of his letters. Of these 44 letters, the Hamilton biography copies (with some use of quotation or close paraphrase) protected sequences constituting at least one-third of 17 letters and at least 10 percent of 42 letters. These sequences are protected, notwithstanding that they include some reporting of facts and an occasional use of a commonplace word or expression. Hamilton's use of these sequences "exceeds that necessary to disseminate the facts." *Harper & Row, supra*, 471 U.S. at 564. Judge Leval found that "[i]n the rarest case a complete sentence was taken." _ F. Supp. at _ . That is true only with respect to material directly quoted. The material closely paraphrased frequently exceeds ten lines from a single letter. Even if in one or two instances the portions of the letters copied could be said to lack sufficient creativity to warrant copyright protection, there remains sufficient copying of protected material to constitute a very substantial appropriation.

The taking is significant not only from a quantitative standpoint but from a qualitative one as well. The copied passages, if not the " 'heart of the book,' " *Harper & Row, supra*, 471 U.S. at 565 (quoting the District Court's opinion, 557 F. Supp. at 1072), are at least an important ingredient of the book as it now stands. To a large extent, they make the book worth reading. The letters are quoted or paraphrased on at least 40 percent of the book's 192 pages.

In sum, the third fair use factor weighs heavily in Salinger's favor.

4. *Effect on the Market.* The Supreme Court has called the fourth factor—effect on the market for the copyrighted work—"the single most important element of fair use." *Harper & Row, supra,* 471 U.S. at 566 (footnote omitted). As Judge Leval recognized, the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime. First, the proper inquiry concerns the "potential market" for the copyrighted work. 17 U.S.C. § 107(4); *see Pacific and Southern Co. v. Duncan,* 744 F.2d 1490, 1496-97 (11th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985). Second, Salinger has the right to change his mind. He is entitled to protect his *opportunity* to sell his letters, an opportunity estimated by his literary agent to have a current value in excess of $500,000.

Proceeding from his conclusion that only a few fragments of the letters have been used in Hamilton's book, Judge Leval expressed the view that such use would have "no effect" on the marketability of the letters. _ F. Supp. at _ . Concluding as we do that substantial portions of the letters have been copied, we do not share the District Judge's view that marketability of the letters will be totally unimpaired. To be sure, the book would not displace the market for the letters. Indeed, we think it likely that most of the potential purchasers of a collection of the letters would not be dissuaded by publication of the biography. Yet some impairment of the market seems likely. The biography copies virtually all of the most interesting passages of the letters, including several highly expressive insights about writing and literary criticism. Perhaps few

readers of the biography would refrain from purchasing a published collection of the letters if they appreciated how inadequately Hamilton's paraphrasing has rendered Salinger's chosen form of expression.[5] The difficulty, however, is that some readers of the book will gain the impression that they are learning from Hamilton what Salinger has written. Hamilton frequently laces his paraphrasing with phrases such as "he wrote," "said Salinger," "he speaks of," "Salinger declares," "he says," and "he said."[6] For at least some appreciable number of persons, these phrases will convey the impression that they have read Salinger's words, perhaps not quoted verbatim, but paraphrased so closely as to diminish interest in purchasing the originals.

The fourth fair use factor weighs slightly in Salinger's favor.

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[5]A few examples should suffice. Salinger, complaining of an editor who has rejected one of his stories though calling it "[c]ompetent handling," writes: "Like saying, She's a beautiful girl, except for her face." Hamilton paraphrases: "How would a girl feel if you told her she was stunning to look at but that facially there was something not quite right about her?"

Salinger writes: "I suspect that money is a far greater distraction for the artist than hunger." Hamilton paraphrases: "Money, on the other hand is a serious obstacle to creativity."

Salinger, conveying the adulation of Parisians toward Americans at the liberation of Paris, writes that they would have said, " 'What a charming custom!' " if "we had stood on top of the jeep and taken a leak." Hamilton paraphrases: if "the conquerors had chosen to urinate from the roofs of their vehicles."

[6]In the District Court Salinger contended that Hamilton's use of such phrases, inserted among close paraphrases, would confuse and deceive the public, thereby creating a cause of action for unfair competition. This claim is not pursued on this appeal. Nevertheless, it is fairly arguable that the repeated use of phrases having the tendency to create the misimpression that Salinger's own words are being reported cuts substantially against any contention that Hamilton's use of the letters is "fair."

On balance, the claim of fair use as to Salinger's unpublished letters fails. The second and third factors weigh heavily in Salinger's favor, and the fourth factor slightly so. Only the first factor favors Hamilton. We seriously doubt whether a critic reviewing a published collection of the letters could justify as fair use the extensive amount of expressive material Hamilton has copied. However that may be, if fair use is to have a more "limited scope" with respect to unpublished works, it is not available with respect to the current version of Hamilton's proposed biography.

To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported. Salinger's letters contain a number of facts that students of his life and writings will no doubt find of interest, and Hamilton is entirely free to fashion a biography that reports these facts. But Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under "ordinary circumstances," *Harper & Row*, *supra*, 471 U.S. at 555. Public awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright, save for such special circumstances as might fall within the "narrower" scope of fair use available for unpublished works, *id.* at 564. Evidently, public interest in the expressive content of the letters of a well-known writer remains substantial even fifty years after his death. *See, e.g.*, "516 Pirandello Letters Donated to Princeton," *The New York Times*, Dec. 29, 1986, at C13, col. 1 (reporting the great interest in the donation of the unpublished letters of Luigi

Pirandello to the Princeton Library fifty years after the playwright's death).

Since we conclude that the record establishes Salinger's entitlement to a preliminary injunction on his copyright claim, we need not consider at this stage of the litigation whether he is also entitled to relief by virtue of the library agreements.

Reversed and remanded with directions to issue a preliminary injunction barring publication of the biography in its present form.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Plaintiff,

86 Civ. 7574 (P

– against –

RANDOM HOUSE, INC. and IAN HAMILTON,

Defendants.

Kaye Collyer & Boose, New York City (R. Andrew Boose, Jeremy Nussbaum, Marcia B. Paul, M. Graham Coleman, 2d of counsel), for plaintiff.

Satterlee & Stephens, New York City (Robert M. Callagy, Mark A. Fowler, of counsel), for defendants.

LEVAL, District Judge.

J.D. Salinger, the celebrated author of *The Catcher in the Rye*, *Franny and Zooey*, *Raise High the Roof Beam, Carpenters*, and many short stories, brings this action against Ian Hamilton and Random House, Inc., who are respectively the author and publisher of an unauthorized and as-yet unpublished biography entitled *J.D. Salinger: A Writing Life*. The biography draws heavily from copyrighted letters written by Salinger many years ago. The complaint alleges copyright infringement, unfair competition, and breach of undertakings Hamilton made with libraries as a condition of access to some of the letters. Salinger moves for a preliminary injunction restraining distribution of the biography.

Hamilton is a writer, literary critic, and poet. After Random House published his well-respected *Robert Lowell: A Biography* in 1982, Hamilton set out to chronicle Salinger's life.

He received advances of $100,000 from Random House and £25,000 from the British publisher William Heinemann. In July 1983, he wrote to Salinger requesting his cooperation.

Salinger for some 30 years had maintained a reclusive privacy, avoiding all publicity. He replied that he would regard any biography written during his lifetime as an invasion of privacy.

Hamilton nonetheless proceeded with his research. He had little success until his discovery of "a tremendous autobiographical resource" (Hamilton Aff. ¶8) – several series of letters written by Salinger years before, some of which had been lodged by the recipients (or their estates) in research libraries at Harvard, Princeton, and the University of Texas. Hamilton also found a bibliography of Salinger materials, edited by Jack Sublette and published by Garland Press, Inc. in 1984, which referred to and quoted letters deposited with Princeton's library. Salinger was unaware of the Sublette bibliography and of the deposits of his letters in the libraries.

In order to gain access to the letters at Princeton, Harvard, and the University of Texas, Hamilton signed the libraries' standard form agreements in which he undertook not to publish the documents without their permission and that of the copyright holder. The "Princeton University Library Request for Access to Manuscripts," for example, states in part:

> I understand that Princeton University holds manuscripts for purposes of research and scholarship. I agree not to copy, reproduce, circulate or publish them without the permission of Princeton University Library and of the owner of the literary property rights, if any. I assume all responsibility for any infringement by me of the literary property rights held by others in the material requested.

Hamilton submitted his manuscript in September 1985. It contained very substantial quotation from approximately 70 of the letters. In May 1986, galleys were sent to book reviewers, as well as to potential licensees in the publishing industry, and some advance reviews appeared.

Salinger somehow received a copy of the May Galleys. Then realizing that copies of his letters had been donated by their recipients to the libraries, he caused the letters to be registered for copyright protection in his name. On May 30, 1986, his attorneys wrote to Hamilton and Random House demanding that the book not be published unless and until all of Salinger's unpublished materials were deleted. Defendants then sought the libraries' permission to quote from the correspondence, but without success.

In response to Salinger's demand, Hamilton revised the book to reduce drastically the amount of direct quotation. He revised, rewrote or paraphrased most of the previously quoted material, limiting quotation to no more than 10% of any one letter and, in most cases, no more than 10 words from any one letter. In the new September proofs (Exh. D to the Timberman affidavit), there remain between 200 and 300 words of direct quotation, representing something between 0.8% and 2.0% of the content of the copyrighted correspondence. Because the Princeton, Harvard, and Texas libraries refused permission to quote from their letters, Hamilton eliminated all direct quotations from letters available only at those libraries. He retained certain quotations from letters at Princeton that are also found in the Sublette bibliography.[1]

The September proofs use the letters as an important source to report Salinger's opinions, thoughts, feelings, and fantasies as a young man. A substantial percentage of the book consists of material learned by Hamilton from the letters.

By agreement with Salinger, defendants submitted the revised September page proofs to his attorneys on September 18, 1986. Salinger promptly brought suit, asserting that the biography

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[1] On September 24, 1986, plaintiff's attorneys wrote to Sublette and his publisher demanding that they delete all quotation and paraphrasing of Salinger's unpublished works before distributing any further copies of the bibliography. Salinger Aff. ¶ 23, ex. N. Plaintiff's attorneys were advised by the Princeton library that Sublette had not obtained library permission to quote the letters.

infringes his copyrights and that he will be irreparably harmed if publication and distribution are allowed to proceed. On October 3, 1986, I granted a temporary restraining order to preserve the status quo. Defendants agreed to extend the TRO until today's date to permit discovery, submission of a hearing record, briefing and ruling on Salinger's motion for a preliminary injunction. For the reasons set forth below, that motion is now denied.[2]

Discussion

1. *The Scope of Copyright Protection.*

The first question to be considered is whether and to what extent Hamilton's book takes material from Salinger's letters that is protected by the copyright. Salinger contends the taking goes far beyond the 200-300 quoted words. He contends that lengthy portions of numerous letters are tracked and paraphrased in a manner that misappropriates his copyrighted expression. He argues that the material so taken constitutes the "heart" not only of his letters, but also of Hamilton's book. *Cf. Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 2233-34, 85 L.Ed.2d 588 (1985).

Salinger is correct that copyright infringement is not limited to verbatim quotation. Paraphrase that reproduces the original author's protected expression also is a violation. *See, e.g., Donald v. Zack Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5th Cir.1970); *Davis v. E.I. DuPont de Nemours & Co.*, 240 F.Supp. 612, 621 (S.D.N.Y. 1965).

On the other hand the copyright does not protect all of the material in an author's original work. The importance of free public dissemination of ideas and matters of historical fact dictates

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[2] Although this lawsuit is directed against the May galleys as well as the new September galleys, the defendants have represented that there will be no further distribution of the text as it appeared in May. Accordingly, I have regarded the injunction motion as moot insofar as it may pertain to the earlier form of the text.

that they should not be subject to private ownership or control. It is therefore axiomatic that the copyright does not encompass facts or ideas. What is protected is the art, or craftsmanship—the author's particular manner of expression. *See, e.g., Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.1976) (*quoting* Chafee, *Reflections on the Law of Copyright*, 45 Colum.L.Rev. 503, 513 (1945)); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.1960).

To make a determination of the extent of taking of copyrighted material, it is therefore necessary to examine closely the comparison of the copyrighted and the accused passages, not only to determine the extent and nature of similarity but also to ascertain whether what was taken is in the protected category or in the unprotected realms of fact and idea. *See, e.g., Werlin v. Reader's Digest Ass'n*, 528 F.Supp. 451, 462 (S.D.N.Y.1981). To facilitate this test, plaintiff has submitted at the court's request a compilation of 59 instances of comparative texts representing "as complete a picture as possible" of the alleged infringements. (The list, set forth as Exhibit A to the Coleman affidavit of October 16, 1986, is hereafter referred to as "Exhibit A".)

The comparison reveals that the vast majority of the material taken by Hamilton from the letters is not copyright protected. Salinger's letters are full of information about his life upon which the biographer has drawn. Such information is not protected by the copyright. Unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital historical fact for the biographer and belongs in the unprotected categories, so long as the biographer does not overstep permissible limits by taking the author's craftsmanship. *See, e.g., Meeropol v. Nizer*, 417 F.Supp. 1201, 1211 (S.D.N.Y.1976), *rev'd on other grounds*, 560 F.2d 1061 (2d Cir.1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978); *see also Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 105 & n. 14 (2d Cir.1983), *rev'd on other grounds*,

471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985). Furthermore, the ideas revealed in a copyrighted work are not protected by the copyright.

For the biographer to report in his own words Salinger's ideas drawn from the letters or the fact that Salinger was depressed, elated, or angry, does not violate the copyright. His resentment against literary critics who, having never taken the risks or braved the pains and difficulties of creative writing, presume to pass judgment on serious authors (Letter No. 34) may be drawn from his letter without infringement, both as an idea and as a historical fact. Likewise, his evaluations of Hemingway (Nos. 37 & 38); his difficulty sustaining his infatuations with girls (Nos. 23 & 32); his determination at one point to write for Hollywood and riches (No. 26); his reticence to yield any of his freedom by accepting an advance (No. 28), etc.

I find that virtually every passage taken by Hamilton from the 59 letters consists primarily of a report of such historical fact (or of an idea) which is not protected by the copyright.

That does not end the inquiry. As noted, the license to report historical fact and idea found in copyrighted material does not carry with it the right to employ the originator's particular words or manner of expression; these are protected by the copyright. *See Nation*, 105 S.Ct. at 2232-33; *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.1980), *cert. denied*, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980). Whether there is infringement does not necessarily turn on whether there is direct quotation. If, for example, the original work quotes a third person (as where Salinger in Letter No. 7 quotes from a rejection letter he received in 1940 from *Esquire*), that quotation is a historical fact, it is not an original creation of the copyright holder, and it may be requoted without infringement. Also, the copyright applies only to original creation and not to cliche or ordinary unoriginal combinations of words. *See* W. Patry, *Latman's The Copyright Law* 23-24 (1986). Although Salinger's letters are predictably vibrant and full of originality of image, metaphor and expression, even he occasionally (albeit

rarely) employs a cliche or a word-combination that is so ordinary that it does not qualify for the copyright law's protection.

Thus where Salinger describes himself as one who "could never even put a Tinker-Toy together" (No. 21), or states that he "miss[es] [his] little typewriter terribly" (No. 17), or describes a work as "the religious book of the century" (No. 52), Hamilton's quotation of those words does not implicate the copyright.

On the other hand, the author's own original image, choice of words, and turn of phrase are protected and there will be infringement (absent justification) when they are appropriated whether by direct quotation or by paraphrase.

A few examples follow (all references to Hamilton's text are to a xerox copy of proofs submitted as defendants' Exh. D) (emphases supplied):

Salinger	Hamilton
Describing Wendell Willkie as a phoney, adds that he looks "like a guy who makes his wife keep a scrapbook for him." (No. 11)	"the sort of fellow who makes his wife keep an album of his press cuttings." (p. 47)
As to why he writes under J.D., complains that Jerome is a lousy name. "It always sounds so much like Jerome . . . . (No. 12)	" . . . Jerome was such a dreadful name: however you said it, Jerome always came out sounding like Jerome." (p. 48)
The men in my tent—though a damn nice bunch—are always eating oranges or listening to quiz programs . . . . (No. 18)	(Substantially quoted on p. 57.)

About a novel he has wanted to write since he was 17, "until I can get icy about the whole thing . . . , I'm not going to touch it. I'm getting colder and colder on it. Won't be long. (No. 29)

"Salinger wants to feel like ice about this book . . . . And he is prepared to wait. The iciness is deepening, and he feels that he will soon be cold enough to make a start." (pp. 67-68)

"[E]verybody over here who's ever taught Senior English for a couple of semesters, or worked for a good upholsterer, has con sidered himself qualified to collect and edit a short story anthology." (No. 57)

"[A]nybody who has 'ever taught Senior English,' however briefly, or been employed by 'a good upholsterer' has reckoned himself to have the perfect skills for putting together an anthology of shorter fiction." (p. 157)

Describing his life as a soldier in the counter-intelligence corps in Germany after its fall, he writes that he and his new wife have bought a sportscar, and that his big black dog Benny "rides on the running board, pointing out Nazis for me to arrest." (No. 40)

"The couple have . . . a large dog called Benny. Benny rides with them in the car and lets them know if he spots any arrestable Nazis." (p. 91)

[See also in No. 39 and at Hamilton, p. 89-90, the reference to being publicly cremated in front of the offices of the Saturday Evening Post in retribution for "treasonous" thoughts; Salinger's bitter fantasy of the domesticity of his once beloved Oona O'Neill with her new aged husband Charlie Chaplin (No. 24 and Hamilton, p. 65); "If [the liberating Americans] had stood on top of the jeep and taken a leak, Paris would have said, 'Ah, the darling Americans! What a charming custom!' " (No. 36, Hamilton p. 82).]

As to each of these passages, the biographer has gone beyond the permissible report of a historical fact or an idea and has reproduced an image, literary device, metaphor or choice of words that is protected by the copyright. In total I have found approximately 30 letters from which Hamilton has taken, either by brief quotation or paraphrase, a few words of copyright protected material. Unless excused under the doctrine of fair use, or found to be too insignificant in net effect to justify a cause of action, these represent instances of infringement and a possible basis for injunction.

2. *Fair Use.*

Despite Hamilton's use of copyright protected material from the letters, his book is not guilty of infringing if those quotations and paraphrases are found to be "fair use." " 'Fair use' is a 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent . . . . ' " *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir.1966) (*quoting* Ball, *Copyright and Literary Property* 260 (1944)). It is described as an "equitable rule of reason." House Report No. 94-1476, 94th Cong., 2d Sess. 66, 1976 U.S. Code Cong. & Ad.News 5659, 5680 (hereinafter "House Report"). The rule is codified at 17 U.S.C. § 107 (1982):

> [T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

> (4) the effect of the use upon the potential market for or value of the copyrighted work.

These factors were distilled from the common law and were not intended as exclusive. Instead, they are the focus of a factual inquiry to determine whether the particular use of copyrighted material should be considered fair and lawful.[3]

A. *Is the Fair Use doctrine applicable to unpublished work?* Plaintiff contends that the privilege of fair use has no application to unpublished work. Common law traditionally protected the author's decision "whether and in what form to release his work," *Nation*, 105 S.Ct. at 2227, including unpublished letters. *See, e.g., Birnbaum v. United States*, 588 F.2d 319, 326 (2d Cir.1978). A leading New York case defined common-law copyright as

> an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely . . . .

Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 345-46, 296 N.Y.S.2d 771, 776 (1968).

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[3] The House Report states:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

House Report at 66, U.S. Code Cong. & Ad.News at 5659, 5680. *See also* S.Rep. 94-473, 94th Cong., 1st Sess. 62 (1975) (hereinafter "Senate Report").

In the Copyright Revision Act of 1976, Congress extended federal protection to the right of first publication. *See* 17 U.S.C. § 106 (1982). The privilege implicates both the author's "personal interest in creative control" and "his property interest in exploitation of prepublication rights." *Nation*, 105 S.Ct. at 2228. Although "common-law copyright was often enlisted in the service of personal privacy," *id.*, Congress was specifically concerned that the copyright owner "have the right to control the first public distribution of an authorized copy . . . of his work." House Report at 62, 1976 U.S.Code Cong. & Ad.News at 5675.

In the *Nation* case, the Supreme Court held that *"[u]nder ordinary circumstances,* the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." 105 S.Ct. at 2228 (emphasis added). "[T]he scope of fair use is narrower with respect to unpublished works." *Id.* at 2232. Thus, "the unpublished nature of a work is '[a] key, *though not necessarily determinitive, factor'* tending to negate a defense of fair use." *Id.* at 2227-28 (*quoting* Senate Report at 64 (emphasis added by this court). *See also* Note, *Copyright and Privacy Protection of Unpublished Works – The Author's Dilemma*, 13 Colum.J.L. & Soc.Probs. 351, 377 (1977). The Court, however, stressed the tailoring of fair use analysis to the particular case. *See* 105 S.Ct. at 2227. It neither stated nor implied a categorical rule barring fair use of unpublished works. *See* Nimmer § 13.05[A][2], at 13-74 to 13-77. *But see Nation*, 105 S.Ct. at 2249 (Brennan, J., dissenting); *Sinkler v. Goldsmith*, 623 F.Supp. 727, 732 (D.Ariz.1985). Indeed, the Court proceeded to evaluate the Nation's use of Gerald Ford's unpublished manuscript in terms of all the statutory fair use factors.

Few recent decisions have involved unpublished works. Citing the *Nation* opinion, the *Sinkler* court granted summary judgment in favor of the copyright counterclaimant because the letters in issue had not previously been published or widely disseminated. The Arizona District Court held that the fair use doctrine "generally applies to materials already released by an author for public consumption." 623 F.Supp. at 732. The

Second Circuit, on the other hand, earlier held a newspaper's publishing of a copyrighted letter to the editor to be a fair use. *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142 (2d Cir.1982). The *Diamond* court did not even regard the unpublished nature of the letter as a factor, perhaps because the plaintiff desired publication and complained merely of the paper's editing of his letter.

Courts have also applied the fair use doctrine to cases involving unpublished architectural plans and medical school admissions test questions (although ruling in these cases against defendants). *Schuchart & Assocs. v. Solo Serve Corp.*, 220 U.S.P.Q. 170, 180 (W.D.Tex.1983) (scope of fair use of the plans narrower than with respect to published works, even though the plaintiff had not kept the plans confidential); *Aitkin, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F.Supp. 252-260 (D.Ne.1982) (court ignored the unpublished nature of the plans, but emphasized that developer had destroyed the copyright owner's only potential market for its work by exploiting an exact copy of the plans for a particular project); *Association of American Medical Colleges v. Mikaelian*,571 F.Supp. 144, 151-53 (E.D.Pa.1983) (test questions were developed under strict security and commercial exploitation of the questions to prepare students for taking the test destroyed their value to the copyright holder); *aff'd without opinion*, 734 F.2d 3 (3d Cir.1981).

More on point are the opinions of New York state courts in a suit to enjoin the publication of a biography of Ernest Hemingway. The writer's wife and estate invoked a common-law copyright in Hemingway's unpublished letters. First, in denying the application for a preliminary injunction, the court suggested that the absence of direct quotation from the letters rendered any copyright infringement de minimis. *Estate of Hemingway v. Random House, Inc.*, 49 Misc.2d 726, 268 N.Y.S.2d 531, 536 (N.Y.Co.), *aff'd without opinion*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966). On the defendant's later motion for summary judgment, however, the court considered the question of fair use. In addition to reiterating that defendants

had not quoted verbatim, the court emphasized the biographical purpose for using the letters, the nature of plaintiffs' literary property, and the absence of any harm to the market for the letters. 53 Misc.2d 462, 279 N.Y.S.2d 51, 57-58 (N.Y.Co.), *aff'd without opinion*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1977), *aff'd on other grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 341 (1968).[4] Plaintiff here argues, citing W. Patry, *The Fair Use Privilege in Copyright Law* 440-41 (1985), that the *Hemingway* court found only that the copying was de minimis. In dismissing the common-law copyright claim, however, the court considered all four of the fair use factors now enumerated in 17 U.S.C. § 107, of which the amount and substantiality of the use is one. I read it as a finding of fair use, as well as of de minimis.

In my view, plaintiff's argument that there may be no fair use of an unpublished work is exaggerated and unreasonable. Of course, fair use protection should be sparingly accorded to quotation from unpublished work lest such use effectively

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[4] The New York Court of Appeals asserted in dictum that there is a freedom not to speak publicly that parallels the common-law copyright in written materials. The Court nonetheless indicated that there is no categorial distinction between published and unpublished works with respect to fair use:

> The indispensable right of the press to report on what people have *done*, or on what has *happened to* them or on what they have *said in public* does not necessarily imply an UNBOUNDED freedom to publish whatever they may have *said in private conversation*, any more than it implies a freedom to copy and publish what people may have put down in *private writings*.
>
> Copyright, BOTH common-law and statutory, rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor.

Id. at 347-48; 296 N.Y.S.2d at 778, 244 N.E.2d at 348 (emphasis in original) (boldface added) (citations omitted).

deprive the creator of his right to exercise reasonable control over his own artistic reputation and over the initial presentation of his work. However, where the proposed use is of such character that it would not affect those interests of the copyright holder, no good reason can justify so extreme a rule as would absolutely bar the fair use of unpublished matter. As the name of the rule implies, it looks to the *fairness* of the secondary reference. If this *unfairly* interferes with the creator's reasonable enjoyment of his right of literary property, it will be enjoined. If, on the other hand, the secondary use is fair, giving due regard for the creator's right to control the first publication, it will be permitted. That the work is unpublished is an important factor, but it is not the end of the inquiry.

I agree with Salinger's counsel that the right of initial publication is entitled to preservation where it is exercised for the purpose of withholding publication, as well as where it is exercised to control the manner of initial presentation. The copyright concerns itself not only with assuring the creator of original work of the right to reap the profits. It concerns itself also with the establishment and maintenance of artistic reputation. *See Schnapper v. Foley*, 667 F.2d 102, 114 n. 5 (D.C. Cir.1981) (citing Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 Harv.L.Rev. 1490 (1979)), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982). In this sense the copyright shares something in common with trademark in that each serves to identify to the public the products coming from a particular source. By the act of publication under his name, the creator risks his reputation in the work. By the same token, if a writer believes that his draft is not up to snuff and does not with to subscribe to it, his copyright permits him to suppress its publication. *See Hemingway*, 296 N.Y.S.2d at 776, 244 N.E.2d at 346. He may not, of course, suppress publication by others of the ideas or the information contained in it, as these are not covered by the copyright. But he may bar unauthorized publication of his unpublished work, even if it is his hope to keep it from being published forever. Thus my finding in Hamilton's favor on the subject of fair use is not based on a perception that, as defense counsel have

argued, the copyright holder may not seek to enforce his right of first publication unless he intends to make such publication.

B. *Is this Fair Use?*

Upon full consideration of the factors that bear on the question of fair use, it is my view that defendants have made a sufficiently powerful showing to overcome plaintiff's claims for an injunction. The reasons that support this finding are: Hamilton's use of Salinger's copyrighted material is minimal and insubstantial; it does not exploit or appropriate the literary value of Salinger's letters; it does not diminish the commercial value of Salinger's letters for future publication; it does not impair Salinger's control over first publication of his copyrighted letters or interfere with his exercise of control over his artistic reputation. The biographical purpose of Hamilton's book and of the adopted passages are quite distinct from the interests protected by Salinger's copyright. Finally, although both Hamilton and Random House no doubt hope to realize profit from the sales of the book, it is a serious, carefully researched biography of an important literary figure (of whom little is known); its publication is of social and educational value.

(i) *Extent of Appropriation.* The "amount and substantiality" of the use of the copyrighted work is a factor specified by the statute. As noted above, Hamilton's main drawings from Salinger's letters are of biographical material that is not protected by the copyright. If one looks at the totality of the material drawn from the letters, it is no doubt true, as plaintiff argues, that Hamilton has taken important matter from them. But for this inquiry we must distinguish between what is copyright protected and what is not. Although a large amount of *information* is taken from the letters, and is of vital importance to the book, the information is not protected by the copyright.

The appropriate quantitative and qualitative analysis is directed to Hamilton's taking of copyright protected matter. This is limited to about 30 instances of the use of a word

or a phrase or an image. These instances rarely involve more than a few words of Salinger's copyright protected material. In the rarest case, a complete sentence is taken (see No. 3). These passages are not the heart of Salinger's letters, nor of Hamilton's book. The taking of copyright protected matter is insignificant.

There can be no doubt these passages improve Hamilton's book. It is, after all, the biography of a powerful writer. The history is more lively and true to the extent that it uses Salinger's own sharp images in preference to a neutered description of his thoughts or feelings. It certainly tells more about Salinger to read his acid quip that anyone who has worked for "a good upholsterer" considers himself qualified to edit a short story anthology (No. 57), than to be told that he resented the presumption of unqualified editors.

Hamilton's testimony suggests he agrees that he did not improve his book by eliminating and writing around most of the quoted matter that appeared in the May galleys. But what he did accomplish was to reduce from a large number to fewer than 30 the instances of use of copyrighted expression. He has thus very substantially improved his entitlement to claim fair use.

The few and brief instances that remain add color and accuracy of detail to the portrait of Salinger. They do not give the reader the sense that she has read Salinger's letters. They do not give the reader a basis to evaluate Salinger's skills as a writer. The excerpting of these details does not interfere with Salinger's control over initial publication.

(ii) *Difference of Purpose and Effect on Market.* Hamilton's work is biographical; it is neither a presentation, nor even a critique of Salinger's work. The Salinger letters serve Hamilton primarily as a source of biographical information and detail and not as a reservoir of Salinger literature to be revealed in Hamilton's book. A biographical subject's letters can play an important role in filling out the history or portrait, the internal life of the subject – his thoughts, opinions, moods and feelings.

But the use of letters as a source poses a dilemma for the biographer. To the extent he quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description.

Courts have thus recognized the legitimacy of use of excerpts from copyrighted letters in service of a biographical portrait, *see, e.g., Hemingway*, 279 N.Y.S.2d at 58; *Meeropol*, 417 F.Supp. at 1211-12, but at the same time, they have warned against going too far. *Meeropol*, 560 F.2d at 1069-71 (reversing grant of summary judgment to defendants because of factual uncertainties with respect to the substantiality of the use, the purpose of copying entire letters and long passages verbatim, and the effect of the book's publication on the future market for the letters). A biographical purpose will not excuse "extensive verbatim copying or paraphrasing" of copyrighted matter. *Rosemont*, 366 F.2d at 310; *see also Iowa State U. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60-61 (2d Cir.1980).

George Washington's copyrighted letters were found by Justice Story in 1841 to form a substantial part of an infringing biography. *Folsom v. Marsh*, 9 Fed.Cas. No. 4901 p. 342 (C.C.D.Mass.). Justice Story held that there could be no fair use of letters in a historical work if "the value of the original is sensibly diminished or the labors of the original author are substantially appropriated." Letters "may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy." *Id.* at 348, quoted in *Meeropol*, 560 F.2d at 1070. Justice Story added, however,

> It is not a case where abbreviated or select passages are taken from particular letters; but the entire letters are taken, and those of most interest and value to the public. . . . If it had been the case of a fair and bona fide abridgement of the work of the plaintiffs, it might have been admitted of a very different consideration.

Id. at 349, quoted in *Meeropol*, 417 F.Supp. at 1212.

What is therefore required is careful case-specific analysis whether, on all the factors, the biographer's use of copyrighted expression has been fair and reasonable or whether it has trespassed excessively on the copyright. *See Meeropol*, 560 F.2d at 1069-71. Such examination demonstrates the reasonable scope and purpose of Hamilton's appropriations.

How copying affects the marketability of the copyrighted work was described in *Nation*, 105 S.Ct. at 2234, (*citing* 3 Nimmer § 13.05(A)(4), now at 13-79) as "undoubtedly the single most important element of fair use." This issue is not merely a matter of quantifying damages. *See* 3 Nimmer § 13.05(A)(4) at 13-79 n. 35.1a. The creator's right to the publication of his copyrighted material involves many factors (including artistic reputation and control of first presentation) that are not wholly compensable by an award of damages. Also, the emphasis is on marketability and commercial value, rather than actual market. Thus, Salinger's intention not to publish does not moot the issue.

On the other hand, the marketability to be considered is the marketability of what the copyright protects, not of the unprotected matter to be found in the copyrighted work. And the issue is whether any effect on marketability of the copyrighted work was brought about *by the use of copyrighted matter* rather than by other factors. *See Nation*, 105 S.Ct., at 2252-53 (Brennan, J., dissenting). Thus, if a copyrighted author sues a book reviewer for infringement and the reviewer defends on grounds of fair use, the negative effect on the marketability of the book that results from the reviewer's low opinion of it is not the market effect of which the rule speaks. What the rule concerns is negative effect on the marketability of the copyrighted work resulting from the sense on the part of the readership that they have already read it in the other publication.

Readers may be drawn to purchase a publication of Salinger's letters for at least two distinct reasons. One reason is the reader's

desire to read Salinger's work. A second reason may be the reader's interest in acquiring information about Salinger's early life.

The copyright law and the question of fair use concern themselves with the readers in the first category. If Hamilton's book revealed the literary content of Salinger's letters to such degree that any appreciable number of potential purchasers in the first category would be dissuaded from buying the letters, feeling that they had already read them in Hamilton, that would argue strongly against a finding of fair use. In my view, however, Hamilton's use of Salinger's copyright protected matter is so slight that it in no way diminishes the marketability of Salinger's letters among readers of Salinger.

There may be an effect on the readership motivated only by the second desire. A person drawn to purchase Salinger's letters only by the desire to learn more about Salinger's life might find that her biographical interest had been satisfied by the information conveyed in Hamilton. This readership may indeed be affected, but only by Hamilton's report of unprotected, historical facts, not by his use of copyright protected expression.

I conclude that Hamilton's limited use of copyright protected passages from Salinger's letters would have no effect on the marketability of the letters, as contemplated by the fair use statute.

(iii) *Commercial v. Educational.* "[F]air use . . . for such purposes as criticism, comment, news reporting . . . scholarship or research is not an infringement. . . . [T]he factors to be considered shall include . . . whether such use is of a commercial nature or is for nonprofit educational purposes. . . ." 17 U.S.C. § 107 (1982). In so saying, the statute somewhat unrealistically paints the world into two corners – the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship. The protection of the

statute should not turn on sackcloth and missionary zeal. It rather directs the court to make an appraisal of social usefulness and of commercial fair play. Notwithstanding the hopes undoubtedly shared by Hamilton and his publisher for the best seller list and its monetary rewards, this factor favors the defendants. *Cf. Maxtone Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986); *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984); *Rosemont*, 366 F.2d at 307.

As an extraordinarily talented and fascinating author, Salinger is a figure of great public interest. His novels are among the most widely admired and sold of the last quarter century. Because of his firmly maintained wish for privacy, little is known of him. Although his desire for privacy is surely entitled to respect, as a legal matter it does not override a lawful undertaking to write about him using legally available resources.

Hamilton's book cannot be dismissed as an act of commercial voyeurism or snooping into a private being's private life for commercial gain. It is a serious, well-researched history of a man who through his own literary accomplishments has become a figure of enormous public interest. This favors a finding of fair use.

The *Nation*, on which plaintiff relies heavily, is easily distinguished. There the defendant had deprived the copyright licensee of commercial value by a gun-jumping publication that pirated "the heart" of the copyrighted work. The market for the copyrighted work was seriously affected. Those factors played a powerful role in the Supreme Court's decision. *See* 105 S.Ct. at 2232-35. None of them is present here.

(iv) *Equitable Factors*. Salinger argues further that unfair conduct on Hamilton's part in disregarding the library agreements should disqualify him from receiving the benefits of the equitable fair use doctrine. This is the only point on which I find Hamilton's position less than wholly persuasive. He

contends his conduct was justified by his understanding that the requirement of permission applied only to infringement of copyright and that, because of the fair use doctrine, the material he took from the letters involved no infringement. As discussed below, I am inclined to agree with his understanding of the library agreements. And had the initial draft of his book been similar to its present modified form, his second point would be more convincing. Given the extensive quotation from the letters that appeared in the May galleys, Hamilton was certainly giving himself a generous benefit of the doubt in concluding that the library agreements did not call for permissions.

The issue does not easily admit of a clear finding. But even assuming an ultimate conclusion that Hamilton was cavalier about the need for permissions, that would not justify enjoining his book in its present form.

In my view, the use of copyrighted matter in the present form of the book is so minimal and the case favoring a finding of fair use is so convincing that an injunction cannot be justified, even if it were found that Hamilton showed more solicitude for his own interests than for Salinger's in dealing with the library agreements.

3. *De Minimis*

If there were some impediment to a finding of fair use – such as, for example, plaintiff's extreme contention that fair use has no application to unpublished work, it would be necessary to consider whether the extent of infringement was too insignificant to justify enjoining Hamilton's biography. Enjoining publication of a book is a serious matter. With all respect for the rights of a copyright owner, a publication should not be enjoined where the degree of infringement is trifling and inconsequential. *See Rosemont*, 366 F.2d at 306, 311; *Belushi v. Woodward*, 598 F.Supp. 36, 37-38 (D.D.C.1984); *Estate of Hemingway*, 268 N.Y.S.2d at 534, 536. Because I find fair use so clearly established, I need not reach a finding on whether, absent

fair use protection, the infringement would be so insignificant as to warrant the denial of even a preliminary injunction. In all likelihood, Hamilton would prevail on this issue.

Hamilton's use of copyrighted expression is so minimal, it is difficult to perceive any harm to Salinger. The wound he has suffered is not from infringement of his copyright but from the publication of a biography that trespasses on his wish for privacy. The copyright law does not give him protection against that form of injury.

4. *Lanham Act Claim*

Salinger also alleges that defendants have violated § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a) (1982). He argues that the biography's quotations and paraphrases, often introduced by such words as "Salinger said," are likely to mislead the reading public into believing that Salinger was interviewed for and sponsored the biography.

The contention is without merit. The reader could not reasonably infer that the biography had benefitted from interviews of Salinger. In the first place, Salinger's present and long-standing reclusive unavailability to the world is one of its dominant themes. Hamilton makes no pretense of having interviewed Salinger. In the epilogue, for example, Hamilton attributes to a reliable, but undisclosed, source that Salinger, since withdrawing all his works from publication, has written two full-length manuscripts which he keeps locked in a safe (pp. 194-95). In the course of the narrative, Hamilton recounts an incident in 1953 in which Salinger, having moved to Cornish, New Hampshire and befriended the local high school kids, agreed to give two of the girls an interview for the high school page of the local newspaper. Hamilton reports Salinger's sense of betrayal when that interview appeared as a scoop on the front page of the local paper. Hamilton adds, "It was the last interview Salinger has ever given to anyone." (pp. 138-39.)

Also, under § 43(a), Salinger contends that Hamilton has presented him misleadingly by distorting paraphrase. This is a Catch-22 claim: If Hamilton used Salinger's words, he violated

the copyright act; if he avoided using Salinger's words, he violated the Lanham Act. There is, however, no showing of distortions that would give rise to a Lanham Act claim. *Cf. Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 23-25 (2d Cir.1976).

5. *Third-Party Beneficiary Contract Claim*

Salinger also alleges that Hamilton violated his rights as a third-party beneficiary under agreements Hamilton made with libraries to gain access to his correspondence. This claim is independent of the copyright contentions. In my view, however, the intention and scope of those agreements are to protect the literary property interests of the owner and not to give the copyright owner an arbitrary power to block legitimate non-infringing use.

Although a few words considered out of context may seem to imply a more extreme purpose, the full text of the library agreements (including in the case of Texas the accompanying "Information for Manuscript Readers") makes clear that their purpose is to safeguard literary property rights.[5] Although the precise text of the Harvard and Texas agreements seem to go farther than Princeton in restricting the researcher from "quot[ing]" (Texas) or publishing "any excerpt" (Harvard), this restriction should be understood as applying only to quotations and excerpts *that infringe copyright*. To read them as absolutely forbidding any quotation, no matter how limited or appropriate, would severely inhibit proper, lawful scholarly use and place an arbitrary power in the hands of the copyright owner going far beyond the protection provided by law. Often, for example, an idea cannot be reported accurately without some quotation.

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[5] Indeed, the libraries are concerned that they not be exposed to copyright claims against them. Thus the Princeton agreement requires that the researcher "assume all responsibility for any infringement by [him] of the literary property rights held by others in the material requested." Salinger Aff., ex. E. Similarly, the Harvard application provides that he "agree to indemnify and hold harmless the University, its officers, employees and agents from and against all claims made by any person asserting that he is an owner of the copyright." *Id.* ex. G.

To require the historian or commentator to paraphrase would simply cause inaccuracy and misunderstanding, impeding scholarship. I believe it would be unreasonable to construe the library agreements as so far-reaching. In any event, the new September proofs have eliminated all direct quotation from the Harvard and Texas letters.[6]

In view of my understanding of the scope of these agreements, I need not reach the defendants' contention that Sublette's prior publication of quotes from the Princeton library freed those materials for Hamilton's use. In any event, the Princeton agreement does not expressly forbid "quotation."

6. *The Standards for Preliminary Injunction*

A preliminary injunction may be granted in this Circuit only upon a showing of irreparable harm and either (1) likelihood of succcess on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, together with a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir.1979); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 (2d Cir.1979). The standard for preliminary relief is less demanding than for a permanent injunction. Nonetheless, Salinger has not made the showing required for a preliminary injunction. I find for the defendants on every issue.

Salinger has demonstrated no likelihood of success. To the contrary, I believe the defendants have so far shown their likelihood of success that it is doubtful whether plaintiff prevails on the first factor of the second branch – a showing of fair grounds for litigation. I need not resolve that issue, however,

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[6] Salinger also contends that Hamilton has violated the further conditions set forth in a letter to Hamilton from Gerald Gunther, the custodian of the Hand papers for the Harvard library. The submissions, however, fail to establish that Gunther's letter constituted an additional contract, supplementing the Harvard library agreement that it refers to. And even if it did, it is the sense of Gunther's letter that "actual quotation" would require a further permission. The September proofs do not quote from those letters.

because plaintiff has shown neither irreparable harm nor the balance of hardships tipping decidedly in his direction.

Hamilton's appropriations of copyrighted expressions are too minimal to subject Salinger to any serious harm. There is no substantial revelation of the copyright protected aspects of his letters. There is no adverse impact on their market value as literature by Salinger.

The adverse impact on defendants from a preliminary injunction, on the other hand, would be substantial. *Cf. Belushi*, 598 F.Supp. at 37. The book is in print awaiting distribution. The lengthy delays that might result from waiting for appeals and for final trial on the merits might seriously impair the marketability of the book. First publication licenses optioned to *The New York Times Sunday Magazine* would be imperiled. The balance of hardships favors the defendants.

In addition, both sides acknowledge there is little or no significant evidence to be added at final trial that might justify a temporary stay awaiting the collection of the full evidence.

Upon all the factors, the application for a preliminary injunction is denied.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 657—August Term, 1986

(Petition for rehearing
submitted: February 12, 1987 Decided: May 4, 1987)

Docket No. 86-7957

JEROME D. SALINGER a/k/a J.D. SALINGER,
Plaintiff-Appellant,

— v. —

RANDOM HOUSE, INC. and IAN HAMILTON,
Defendants-Appellees.

Before:

NEWMAN and MINER,
Circuit Judges.

PER CURIAM:

Following our decision of January 29, 1987, 811 F.2d 90, appellees have petitioned for rehearing and, in sup-

port of their petition, have moved to supplement the record on appeal. They wish to include Judge Leval's marked copy of plaintiff's trial exhibit that sets forth those passages of Salinger's letters alleged to be infringed and compares them with the allegedly infringing passages of Hamilton's biography. Judge Leval color-coded his copy, meticulously marking the passages in five colors to reflect his view as to whether the passage contained an infringing quotation, an infringing paraphrase, a non-infringing quotation (because Salinger was quoting someone else or because the quoted words were a cliche), a non-infringing report of historical facts, or a non-infringing report of ideas. Judge Leval first disclosed his marked copy of the exhibit to the parties at a chambers conference on February 18, 1987, and that day ordered it made a part of the record in the District Court.

However, on March 9, 1987, Judge Leval vacated his February 18 order, expressing doubt as to his jurisdiction to enter the order during the pendency of the appeal from the denial of the preliminary injunction. To eliminate any basis for such doubt, we issued our mandate on April 1 remanding the case to the District Court for the limited purpose of deciding whether to add the Judge's marked copy of the exhibit to the trial record. By order dated April 23, Judge Leval reinstated his February 18 ruling. Pursuant to our April 1 ruling, the mandate has been recalled following Judge Leval's ruling, and the issue of supplementing the appellate record is now properly before us.

We have authority to supplement the record on appeal, Fed. R. App. P. 10(e), even at this late stage of the appellate process, *see American Chemical Paint Co. v. Dow Chemical Co.*, 164 F.2d 208, 209 (6th Cir. 1947), and

have concluded that we should do so in this instance. The marked exhibit clarifies our understanding of the process by which the District Judge reached the decision challenged on appeal.

Having examined the marked exhibit, we can eliminate the uncertainty we previously expressed as to whether Judge Leval had considered those passages of Salinger's letters that Hamilton's biography had closely paraphrased. We can now be certain that such passages were considered, a matter we had been willing to assume on our initial consideration of the appeal. *See* 811 F.2d at 98.

Nevertheless, we see no reason for altering our conclusion that the biography, in its present form, infringes Salinger's copyright in his letters. Indeed, the marked exhibit reenforces our conclusion that the District Judge has, in some instances, misapplied the governing standards. Now that we can identify precisely those passages that the District Judge deemed to be infringing and non-infringing, it is evident that some passages containing facts and ideas were not deemed infringing, even though those passages impermissibly took the expressive content of Salinger's letters by copying the author's "association, presentation, and combination of the ideas and thought which go to make up [his] literary composition." *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929).

The motion to supplement the record is granted. The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Plaintiff,

86 Civ. 7574 (

— against —

RANDOM HOUSE, INC. and IAN HAMILTON,

Defendants.

PRELIMINARY INJUNCTION

This cause having come on to be heard on plaintiff's application, by Order to Show Cause, for a preliminary injunction served and filed October 3, 1986, against the publication by defendants of a certain biography of the plaintiff; the Court having considered the Record submitted thereupon and having issued an Opinion and Order dated November 5, 1986; and plaintiff having appealed therefrom; and the United States Court of Appeals for the Second Circuit, by Opinion of the Honorable Jon O. Newman, Circuit Judge, dated and filed January 29, 1987, having made findings of fact and conclusions of law, and having reversed and remanded this Court's Opinion and Order with directions to this Court to issue a preliminary injunction barring publication of the biography in its present form, it is

ORDERED, that defendants Ian Hamilton and Random House, Inc. and all those acting under their direction or pursuant to their control and/or under license or authority from them, be and they hereby are preliminarily enjoined and restrained pending trial and determination of this action, from publishing, distributing, licensing, marketing or otherwise disseminating the book currently entitled *J.D. Salinger: A WRITING LIFE* or excerpts thereof, in its present form; and it is further

ORDERED, that plaintiff shall continue in full force and effect his present bond, posted herein at the time this Court issued its Temporary Restraining Order in the sum of $5,000, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Issued: New York, New York
Feb. 18, 1987

HON. PIERRE N. LEVAL
U.S.D.J.

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. AND IAN HAMILTON,

Petitioners,

vs.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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August 28, 1987

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QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit, in granting a preliminary injunction, correctly applied principles of copyright law most recently set forth by this Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)?

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OPINIONS BELOW

In addition to the opinion of the panel of the Court of Appeals denying rehearing (set forth in the Appendix to the Petition*), the parties were advised by notice from the Clerk of the Second Circuit Court of Appeals filed May 28, 1987 (a copy of which is appended to this brief), that the Court of Appeals had denied the suggestion for rehearing *in banc*.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Section 106 of the Copyright Revision Act of 1976, 17 U.S.C. §106 (1982) (hereinafter the "1976 Copyright Act") provides in pertinent part:

> "Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords; . . . "

Section 109(a) of the 1976 Copyright Act, 17 U.S.C. §109(a) (1982), provides that:

> "(a) Notwithstanding the provisions of Section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner to sell or otherwise dispose of the possession of that copy or phonorecord."

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* The following abbreviations will be used in this brief: "Pet." for citation to the Petition for a Writ of Certiorari; "Pet. App." for citation to the Appendix to the Petition; and "A. ____" for citation to the joint appendix in the Court below.

Section 502(a) of the 1976 Copyright Act, 17 U.S.C. §502(a) (1982), provides that:

> "(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of Section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

No. 87-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. AND IAN HAMILTON,

Petitioners,

vs.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jerome D. Salinger a/k/a J. D. Salinger respectfully opposes this petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit issued in this action on January 29, 1987 granting a preliminary injunction restraining publication of a biography in its present form.

Statement of the Case

Neither the celebrity of respondent J. D. Salinger, nor his well-known desire for privacy, nor invocation of the First

Amendment, can alter the conclusion that this Court should not exercise its discretion to review a decision of the Court of Appeals, which strictly applies this Court's pronouncement in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) ("*Harper & Row*"), on the interplay of the right of first publication and the doctrine of fair use.

Petitioners Random House, Inc. ("Random House") and Ian Hamilton ("Hamilton") have been preliminarily enjoined from publication of a "literary biography" of respondent J. D. Salinger ("Salinger") in its present form, which the Second Circuit found infringed Salinger's copyright in his private, unpublished letters (the "Letters"). This is *not* a case about Hamilton's right to write a biography of Salinger. This is *not* a case about Hamilton's right to use Salinger's Letters as source material for his biography. This is *not* a case about Hamilton's right to report biographical and historical fact he learned from Salinger's Letters. This *is* a case of copyright infringement by reason of a naked taking.

The Court of Appeals, applying the principles set forth in *Harper & Row*, found an extensive taking of Salinger's copyrighted expression, as distinguished from biographical fact, from both a quantitative and qualitative standpoint, by virtue of extensive close paraphrase and, to a lesser extent, verbatim quotation. It therefore held that Salinger's right of first publication outweighed petitioners' claim of fair use, and reversed the decision of the district court as an abuse of discretion. A petition for rehearing, and a suggestion for rehearing *in banc*, were both denied.

Statement of Facts

J. D. Salinger is a well-known author, who wrote and published a number of literary works, all prior to 1965. At issue are 72 letters he wrote from 1939 to 1962, to Judge Learned Hand, Whit Burnett, Elizabeth Murray and others, which have never been published.

In July of 1983, Hamilton wrote Salinger advising that he had been "commissioned" by Random House to write a biography

of Salinger and requesting Salinger's cooperation. A.42, 56. Salinger declined, advising that he preferred not to have such a biography written during his lifetime. A.42, 57. Hamilton proceeded nonetheless.

Hamilton's primary source material for the "literary biography" he subsequently wrote is the Letters. He found most of these Letters in university libraries, where he reviewed them under agreements restricting his right to use and/or quote from them absent permission from *both* Salinger and the libraries, *neither* of which he ever obtained.[1]

Hamilton submitted a manuscript to Random House containing extensive verbatim quotation from the Letters (the "May Galleys"). Salinger learned of this manuscript, objected, and registered the letters for copyright protection. A.18-37, 44. Random House, although it had already distributed review copies, A.46, withdrew the May Galleys from its publication schedule.

Hamilton then apparently reworked the May Galleys with the goal of retaining the same impact – both substantive *and* stylistic – the Letters had in the May Galleys, by merely substituting close paraphrase for direct quotation.[2] His revision (the "Revised Galleys") still uses the Letters to almost exactly the same extent and still contains long expressions of Salinger's private opinions, philosophies, fantasies, criticisms and thought processes, as they were at the time he wrote the Letters, arranged in the same order and pattern as in, and tracking the sequence of, the Letters. A.48.

Hamilton was quite candid in admitting not only that his effort to salvage the May Galleys was difficult ("I will not pretend that this was an easy task") (A.100), but also that, even

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[1] Hamilton *never* attempted to obtain Salinger's permission. A.178-180. None of the libraries ever granted permission, which was requested only *after* the original galleys had been distributed and Salinger demanded their recall. A.183.

[2] Petitioners also use over 200 words of direct quotation, footnoted to a bibliography authored by Jack Sublette (the "Sublette Bibliography"). A.49.

in his own terms, he did not always succeed. When shown a few examples from his book and the Salinger Letters, Hamilton at times conceded that he had in fact adopted Salinger's expressions. He explained that Salinger is "a very contagious writer. His tone is infectious. His turns of phrases are memorable and hard to dislodge from the mind." A.925(b). Alternately, Hamilton argued that he was reporting "fact", when questioned about things that could, under no circumstances, be regarded as fact. When asked why he aped Salinger's initial capitalizations of certain words, he said that he copied only to convey Salinger's tone, one of irony. When asked why he couldn't have flatly stated that Salinger said something in an ironic tone, Hamilton responded pretentiously "that would make a pedestrian sentence I didn't wish to put my name to." A.925(c). When questioned regarding his adoption of Salinger's unusual metaphor to describe a particular politician, he explained that it was Salinger's "very scornful" view of politicians that he was trying to convey. When asked why he didn't simply state that Salinger was very scornful of politicians, he replied: "that is, again, laborious, pedestrian." A.925(j). Rather than be "laborious" or "pedestrian", Hamilton simply appropriated Salinger's expression.

The Opinion of the Court of Appeals

The decision of the Second Circuit Court of Appeals, written by the Hon. Jon O. Newman, tracked the controlling rules set forth in *Harper & Row*. As Judge Newman stated: "our guidance must now be taken from the decision of the Supreme Court. . . in [*Harper & Row*], the Court's first delineation of the scope of fair use as applied to unpublished works." Pet. App. 9. After summarizing the principles set forth in that case, the Court stated: "[f]ollowing the Supreme Court's approach in *Harper & Row*, we place special emphasis on the unpublished nature of Salinger's letters and proceed to consider each of the four statutory fair use factors." Pet. App. 10.

With regard to the first fair use factor, i.e., the purpose of the use, the Second Circuit agreed with Judge Leval that this factor weighs in petitioners' favor, notwithstanding their profit

motive. Pet. App. 11. However, the Court rejected Judge Leval's exposition of the purported "dilemma" for a biographer considering the opposing poles of quotation (with the attendant risk of infringement), and departure from the copyrighted words (with the attendant risk of distortion). Judge Newman demolished this paper tiger, as follows: "This dilemma is not faced by the biographer who elects to copy only the factual content of letters. The biographer who copies only facts incurs no risk of an injunction: he has not taken copyrighted material." *Id.* Hamilton, however, did *not* copy only facts and, therefore, finds himself in his present predicament. As the Court of Appeals observed, "the biographer has no inherent right to copy the 'accuracy' or the 'vividness' of the letter writer's expression." *Id.*

The Court also cited Hamilton's testimony that he did not simply report facts because "that would make a pedestrian sentence I did not wish to put my name to." Pet. App. 12. As Judge Newman noted:

> "[W]hen dealing with copyrighted expression, a biographer (or any other copier) may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a 'pedestrian' sentence. The copier is not at liberty to avoid 'pedestrian' reportage by appropriating his subject's literary devices." *Id.*

The Court then addressed the second fair use factor, the nature of the copyrighted work, giving special weight, as mandated in *Harper & Row*, to the fact that the author's right to control first publication mandates a narrower scope for the application of the fair use doctrine. Nor did the Letters lose their "unpublished" status by virtue of the fact that Hamilton found them in libraries. Pet. App. 12. The Second Circuit therefore concluded that the second statutory fair use factor weighs heavily in Salinger's favor.

With regard to the third factor, the amount and substantiality of the portion used, the Court of Appeals' analysis differed

substantially from that of the district court.[3] Applying the well-settled legal authorities to determine what is paraphrase, the Second Circuit concluded:

> "We have carefully analyzed all 59 of the passages from Hamilton's book cited by Salinger as instances of infringing copying from 44 of his letters. Of these 44 letters, the Hamilton biography copies (with some use of quotation or close paraphrase) protected sequences constituting at least one-third of 17 letters and at least ten percent of 42 letters. These sequences are protected, notwithstanding that they include some reporting of facts and an occasional use of a commonplace word or expression. Hamilton's use of these sequences 'exceeds that necessary to disseminate the facts,' [citing *Harper & Row*, 471 U.S. at 564] . . . The material closely paraphrased frequently exceeds ten lines from a single letter . . . [T]here remains sufficient copying of protected material to constitute a very substantial appropriation." Pet. App. 16.

Not content with a pure quantitative analysis, and once again in keeping with the dictates of *Harper & Row*, the Court of Appeals found that the taking was significant from a qualitative standpoint as well. *Id.* With respect to the copied passages "[t]o a large extent, they make the book worth reading" (*id.*); therefore the Court concluded that the third fair use factor weighs heavily in Salinger's favor.

Applying the fourth factor, the effect on the market for the copyrighted work, the Court noted Salinger's stated present

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[3] Petitioners rely heavily upon Judge Leval's color-coded annotation of the challenged passages of the Book (added to the record, on motion, while the rehearing petition was *sub judice*, in response to the Court of Appeals' reference to certain ambiguities and inconsistencies in Judge Leval's opinion, and prepared at some unspecified time). They neglect to mention that the Court did not rely solely on these ambiguities, expressly stating: "[e]ven if Judge Leval included paraphrases, we conclude that he misapplied the governing standard in determining the number of instances in which Hamilton has used Salinger's copyrighted expression." Pet. App. 14-15.

intent not to publish, and therefore looked to the *potential* market. The Court concluded that some impairment of that market seemed likely, particularly since:

> "The biography copies virtually all of the most interesting passages of the letters, including several highly expressive insights about writing and literary criticism." Pet. App. 17.

Consequently, this factor "weighed slightly in Salinger's favor."

The Second Circuit ruled that Judge Leval had abused his discretion in denying a preliminary injunction, noting that "[m]isapplication of the appropriate legal principles constitutes grounds for overturning the denial or issuance of a preliminary injunction [citations omitted]."* Pet. App. 7. As Judge Newman characterized Judge Leval's erroneous conclusions, they were "[built] on the premise that only . . . fragmentary copying of protected material was involved." Pet. App. 6. As the premise failed, the entire analysis toppled.

Central to the Court of Appeals' analysis, and the major and recurrent failing of this certiorari petition, is the distinction between the preliminary injunction that was issued, restraining publication of the *current version* of Hamilton's biography, and an injunction restraining reporting of the *facts* set forth in the Letters. As the Second Circuit stated:

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* While the district court opinion is couched in the language of "findings," the only "fact-finding" in which it engaged was a comparison of the Letters and the Revised Galleys. The Second Circuit could have considered, but did not consider, the issue of substantial similarity *de novo*, as this issue can be determined by mere comparison on a paper record. *Malden Mills, Inc. v. Regency Mills, Inc.*, 626 F.2d 1112 (2d Cir. 1980); *see also Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1977); *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir. 1976). Similarly, as the "finding" of fair use turns upon legal conclusions drawn from largely undisputed facts, the clearly erroneous standard was inapplicable. *See Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963); *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967), *rev'd on other grounds*, 392 U.S. 390 (1968).

> "To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported. Salinger's letters contain a number of facts that students of his life and writings will no doubt find of interest, and *Hamilton is entirely free to fashion a biography that reports these facts.* But Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances.' [Citing *Harper & Row*, 471 U.S. at 555.]." (emphasis supplied) Pet. App. 19.

Summary of Argument

In urging the grant of certiorari, petitioners urge this Court to act as a mere review court, at the preliminary injunction stage, and in a case governed by a recent and controlling decision of this Court. There is no justification whatsoever for such an unusual exercise of this Court's discretionary power.

Comparison of the facts here with the facts in *Harper & Row* demonstrates beyond cavil, as the Court of Appeals recognized, that Salinger's right of first publication outweighs Hamilton's claim of fair use under the clear guidelines set forth in *Harper & Row*.

Petitioners' attempts to pose an issue warranting grant of certiorari prove too much. In their efforts to demonstrate that the Second Circuit went beyond the dictates of *Harper & Row*, they grossly exaggerate the Court of Appeals' holding, arguing that the Second Circuit has placed "a nearly absolute prohibition against any quotation at all from unpublished material" (Pet. 13, 9); and, "[t]o the Court of Appeals, 'unpublished' meant 'unquotable' " (Pet. 15). The Court of Appeals' decision simply does not say or even imply *any* of these things.

In their efforts to distinguish *Harper & Row*, petitioners read far too narrowly the clear holding of that case. Under their attenuated reading of the legal principles therein announced, no greater protection would exist for unpublished than published materials. This reading would virtually eliminate the right of first publication and would be directly counter to the *Harper & Row* holding.

Petitioners' efforts to distinguish the facts here from the facts of *Harper & Row* are equally unavailing. They argue that paraphrase (not exclusively verbatim quotation) is involved here, but do not take issue either with the proposition that paraphrase is as protected as is verbatim quotation under the copyright law, or with the Court of Appeals' statement of the settled law to determine what constitutes paraphrase. Petitioners instead quibble with the Court's application of that law to the facts of this case.

Secondly, petitioners argue that the inclusion of some quotes from some of the Letters in a bibliography constitutes a "dissemination" sufficient to distinguish the Letters from President Ford's memoirs at issue in *Harper & Row*, and therefore broaden the permissible scope of fair use. But the *Harper & Row* Court identified the *unpublished* nature of the work as both controlling and "negating" the fair use defense. And both *Harper & Row* and earlier precedent require that any "dissemination" be *authorized* to affect any diminution of rights. The facts here are undisputed that Salinger did not *authorize* any "dissemination." Most importantly, Hamilton conceded that his extensive use of the Letters in his popular biography went far beyond the limited use in the scholarly bibliography, so that any dissemination, even if authorized, would not protect Hamilton's taking.

Finally, petitioners pose the very same First Amendment arguments posed by defendants and rejected in *Harper & Row*, which for the same reasons must be rejected here.

REASONS FOR DENYING THE PETITION

I. This Case Presents the "Ordinary Circumstances" Under *Harper & Row*, in Which the Right of First Publication Outweighs The Claim of Fair Use

Addressing the interplay of the right of first publication[5] and the fair use doctrine[6] in *Harper & Row*, Justice O'Connor stated:

> "Perhaps because the fair use doctrine was predicated on the author's implied consent to 'reasonable and customary' use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works. [citation omitted] . . . This absolute rule, however, was tempered in practice by the equitable nature of the fair use doctrine. . . . *But it has never been seriously disputed that 'the fact that the plaintiff's work is unpublished . . . is a factor tending to negate the defense of fair use.'* [citation omitted]. Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works. . . . " 471 U.S. at 551. (emphasis supplied)

> "The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other §106 rights in that only one person can be the first publisher; . . . " *Id.* at 533.

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[5] The exclusive right "to distribute copies . . . of the copyrighted work to the public", including the right of first publication, is the property of the copyright owner. 17 U.S.C. §106.

[6] "Fair use", a common law doctrine which was codified in the 1976 revision of the Copyright Act (17 U.S.C. §107), is an affirmative defense on which petitioners have the burden of proof. *Association of American Medical Colleges v. Mikaelian*, 571 F.Supp. 144, 151 (E.D. Pa. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984).

The Court's position was bolstered by citations to cases stretching back 150 years, including *Folsom v. March*, 9 F. Case. 342 (C.C.D. Mass. 1841), where Justice Story gave early judicial recognition to the fair use doctrine by rejecting it in a case where George Washington's letters formed a substantial part of an allegedly infringing biography.[7]

With the benefit of this historical analysis, the *Harper & Row* Court concluded that although the right of first publication is "expressly made subject to the fair use provision," 471 U.S. at 552, "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *Id.* at 555. No showing has been made as to why this case does not present the "ordinary circumstances" referred to, particularly when compared to the facts of *Harper & Row* itself. Witness the following:

Harper & Row	Salinger
Ford's memoirs, although unpublished, were scheduled to be published imminently.	Salinger's Letters are unpublished, and he has no plan or intention to publish them.
Ford's memoirs concern the Nixon pardon—a topic of public concern.	Salinger's Letters are his private expressions of his philosophies, criticisms, and opinions as a young man.

[7] Petitioners take the Court of Appeals to task for failure to reference *Estate of Hemingway v. Random House, Inc.*, 53 Misc.2d 462 (Sup. Ct. N.Y. Co.), *aff'd*, 29 A.D.2d 633 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341 (1968). Pet. 12. But, apart from citation for the proposition that an author must voluntarily relinquish his right of first publication, the *Harper & Row* Court made no such reference either. This omission is not surprising given that the *Hemingway* holding applied a fair use analysis to published materials only; although infringement of unpublished letters and oral conversations had been alleged at trial, the court held that letters were used in such a *de minimis* fashion as not to constitute an infringement, and that Hemingway had impliedly consented to defendant's use of the oral conversations. *See* W. Patry, *The Fair Use Privilege in Copyright Law*, 440-41 (1985) ("[R]eliance on *Hemingway* as a decision allowing fair use of unpublished works is inaccurate if not misleading . . . ").

Ford's memoirs describe historical events.	Salinger's Letters describe his feelings and opinions.
Ford's memoirs admittedly include material that was not original and therefore uncopyrightable.	Salinger's Letters are wholly original.
Ford's memoirs were written for public dissemination.	Salinger's Letters were written to friends for their private use.
The *Nation* obtained the manuscript surreptitiously.	Hamilton admittedly violated the agreements under which he obtained the Letters.
At issue in *Harper & Row* were verbatim quotations totalling less than 1 percent of Ford's memoirs.	The Second Circuit found that the biography copied protected sequences constituting at least one-third of 17 of 44 Letters and at least 10 percent of 42 Letters.
The Ford materials constituted 13% of The *Nation* article.	The Second Circuit found that the Letters are quoted or paraphrased on at least 40 percent of the book's 192 pages.

Based upon this analysis, as the Second Circuit found, if the rule in "ordinary circumstances" applied in *Harper & Row*, *a fortiorari*, it must apply here.[8]

Application of each statutory factor supports this result. The first feature severely undercutting defendants' fair use claims in *Harper & Row* was the *character* of their use. 17 U.S.C.

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[8] In the only other reported case involving copyright infringement of unpublished letters since *Harper & Row*, *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985), the court routinely applied the *Harper & Row* precedent to reject the fair use defense.

§107(1). Petitioners here attempt to cloak themselves in notions of "criticism, comment . . . scholarship or research." In *Harper & Row*, the Court noted that "[t]he fact that a publication was commercial as opposed to non-profit is a separate factor that tends to weigh against a finding of fair use. . . . The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." 471 U.S. at 562, citing *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982). Certainly petitioners stand to realize significant gain, monetary and otherwise, from publication of this book.

The *Harper & Row* Court also considered "the propriety of the defendant's conduct" in evaluating this factor. There, Victor Navasky, editor of the *Nation*, "knew that his possession of the manuscript was not authorized and that the manuscript must be returned quickly to his 'source' to avoid discovery." *Id.* at 543. Hamilton was likewise aware that copying the language of the Letters without permission was prohibited under the library agreements. A.44-45. Navasky and Hamilton stand on equal footing under this test.

As to the second factor, *i.e.*, the nature of the copyrighted work, 17 U.S.C. §107(2), the manuscript in *Harper & Row* was intended for public dissemination, as opposed to Salinger's private correspondence intended to be read only by its addressees. Petitioners' arguments to the contrary notwithstanding, the fact that these letters were *not intended* for publication renders far more compelling the need for protection of what this Court has termed the "editorial" interest underlying the right of first publication. When considering a work intended for publication, the creative process leading to a work which the author deems ready for publication has been invaded before completion; when considering a work *not* intended for publication, by definition, that creative process has not even

begun.[9] Therefore, the nature of the copyrighted works here — brief, unpublished, and private letters — is a compelling factor *against* a finding of fair use.

As to "the amount and substantiality of the portion used", 17 U.S.C. §107(3), to term Hamilton's use of the Letters "incidental," as do petitioners (Pet. 19), is hardly fair play: quotation or paraphrase on at least 40% of the pages of their book can by no stretch of the imagination be termed "incidental". Moreover, the number of words actually used is not determinative; critical to this Court's analysis in *Harper & Row* was the conclusion that "the *Nation* took what was essentially the heart of the book." *Id.* at 564-65. Hamilton, like the *Nation*, excerpted "subjective descriptions and portraits," ranging in Salinger's case from his theory of the correct portrayal of Hamlet to his thoughts on patriotism. A.880, 890. The endorsement of a qualitative measure of "substantiality" is, therefore, equally applicable here, particularly given the brevity of each Letter.

The fourth factor — "the effect of the use upon the potential market for or value of the copyrighted work" (17 U.S.C. §107(4) — is of peculiar application where the copyright owner currently intends *not* to publish. As noted by the Court below, the fact that Salinger has no present intention to publish is irrelevant, as the inquiry addresses the *potential* market. *See Harper & Row*, 471 U.S. at 568; *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984); *Pacific and Southern Co., Inc. v. Duncan*, 744 F.2d 1490, 1496-97 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). Also, to the extent the right of first publication is unique and can be exercised only once, should Salinger's heirs later decide to publish, the value of the Letters would be substantially diminished. For this reason, this Court created a *presumption* of harm, *Sony Corp.*, *supra*, 464 U.S. at 451, which governs here.

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[9] As petitioners themselves concede, "[l]etters are written . . . for the purpose of communicating" (Pet. 19), *not* for the purpose of publication and its attendant results, both critical and financial.

II. There is No Basis for Distinguishing Harper & Row Here

Petitioners' specific attempts to present circumstances not controlled by *Harper & Row* consist of the following arguments: (1) paraphrase and not verbatim quotation is involved here; (2) there has been some alleged "dissemination" of the Letters; and (3) this preliminary injunction is an impermissible prior restraint on publication of a biography. Each argument is addressed briefly below.

A. *Hamilton Has No Right to Avoid "Pedestrian Reportage" At Salinger's Expense*

Hamilton's extensive paraphrasing of the Letters is as abhorrent under the copyright law as is direct quotation. That rule of law is clear and settled. Nor is there any conflict among the Circuits as to the legal definition of "paraphrase." Petitioners do not take issue with the Court of Appeals' statement of the law; they contest only the application of these clear legal principles to the narrow facts of this case, and strain to do so, at that.[10]

That "copyright protection is not limited to literal reproduction" cannot be contested. 1 M. Nimmer, *Nimmer on Copyright* (hereinafter "Nimmer") §13.03[A] at 13-21. "The mere fact that the defendant has paraphrased rather than literally copied will not preclude a finding of substantial similarity." *Id.* at 13-20.1. Judge Learned Hand (one of the recipients of the Letters) said: "the copyright covers not only the actual sequence of words used, but any equivalent expression which gives substantially the same impression to the mind as the author's words." *Myers v.*

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[10] Petitioners test the outer bounds of advocacy in attacking the Court of Appeals' view of paraphrase (Pet. 17), citing only to a single example selected to demonstrate how "inadequately Hamilton's paraphrasing has rendered Salinger's chosen form of expression," Pet. App. 18 and n.5.

Mail Express Co., 36 C. O. Bull. 478, 480 (S.D.N.Y. 1919)."[11] In *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929), on which the Court below relied, the Second Circuit found impermissible paraphrase in "similarity and copying of the association, presentation, and combination of the ideas and thoughts which go to make up the appellees' literary composition."

The long and the short answer as to whether petitioners have impermissibly paraphrased Salinger's Letters is found in the text comparison (A. 839-93), for as Justice Potter Stewart said of obscenity, "I know it when I see it." Hamilton's slavish adherence to Salinger's choice of situations and emphasis clearly satisfies the Second Circuit's formulation of infringing paraphrase in *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978), as follows:

> "What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words, and the emphasis he gives to particular developments. Thus, the essence of infringement lies not in taking a general theme . . . but in appropriating the 'particular expressions through similarities of treatment, details, scenes, events and

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[11] The *Harper & Row* dissent summarized the relevant standard as follows:

> "[T]he inquiry proceeds along two axes: *how closely* has the second author tracked the first author's particular language and structure of presentation; and *how much* of the first author's language and structure has the second author appropriated [footnote omitted]." 471 U.S. at 583.

See also Nichols v. Universal Pictures Co., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Donald v. Zack Meyer's T.V. Sales & Service*, 426 F.2d 1027, 1030 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); *Meredith Corp. v. Harper & Row, Publishers, Inc.*, 378 F.Supp. 686, 690 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974); *Davis v. E.I. du Pont de Nemours & Co.*, 240 F.Supp. 612, 621 (S.D.N.Y. 1965).

> characterization,' [citation omitted]. In a parallel manner, the essence or purpose of legitimate journalism is the reporting of objective facts or developments, not the appropriation of the form of expression used by the news source."[12]

Hamilton's use of "virtually all of the most interesting passages of the letters including several highly expressive insights" (Pet. App. 17) must be seen as an appropriation far in excess of "that necessary to disseminate the facts" (*Harper & Row*, 471 U.S. at 564).

B. *Salinger Has Not Forfeited His Right of First Publication*

Petitioners label the Letters "technically" unpublished, non-specifically referring to earlier purported "disseminations" of the Letters (or parts thereof), which, they argue, serve to "weaken" or eliminate Salinger's right of first publication and/or expand the scope of permissible use.[13] This argument appears primarily based upon the inclusion of brief quotation and synopses of certain Letters to Whit Burnett, without Salinger's permission, in the Sublette Bibliography.

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[12] As also stated in *Iowa State University v. American Broadcasting Co.*, 621 F.2d 57, 60 (2d Cir. 1980), where defendant claimed that "it was engaged in the laudable pursuit of disseminating the life history of an important public figure":

> "This argument proves too much. ABC possessed an unfettered right to use any factual information revealed in *Champion* for the purpose of enlightening its audience . . . [citation omitted], but it can claim no need to 'bodily appropriate' Iowa's 'expression' of that information by utilizing portions of the actual film . . . [citation omitted] . . . . "

[13] Petitioners cannot seriously contend that the fact that the original Letters are housed at university libraries vitiates Salinger's right of first publication. *See* 17 U.S.C. § 109(a), governing distribution of single copies of a work, which has been explained as follows: "[a] library which owns a copy of a work may lend such copy to its patrons without infringing the copyright owner's distribution right" (Nimmer, § 8.12[B] at 8-120), but those who then examine that letter may *not* in turn copy and publish it (*id.*, §5.04 at 5-33), as petitioners did here.

The undisputed facts are that Salinger has not published any of the Letters, nor has he licensed their use by any other party, including Sublette. A.53. Immediately upon learning of Sublette's unauthorized use from citation of this bibliography in the Revised Galleys, Salinger advised Sublette and his publisher of his exclusive rights to the Letters. A.49, 81-82. Thus, Sublette's digests and quotations from the Letters cannot either be considered a kind of "pre-emptive" first publication or operate as an estoppel. *See* Nimmer, §13.07 at 13-134.

To argue that this "dissemination" somehow justifies their conduct, petitioners isolate the following language in *Harper & Row*: "[i]n a given case, factors such as implied consent through *de facto* publication on performance or dissemination of a work may tip the balance of equities in favor of pre-publication use." Pet. 13. On the basis of this sentence, picked out of context, they argue that Sublette's unauthorized "publication" constitutes a "dissemination" sufficient to tip the balance in this case. But petitioners ignore that the very next sentence in this Court's decision reads "[b]ut it has never been seriously disputed that 'the fact that the plaintiff's work is *unpublished* . . . is a factor tending to negate the defense of fair use' [citing Nimmer]," with no reference whatsoever to dissemination.

Obviously, any letter mailed is "disseminated," in some sense, to its addressee. Following petitioner's selective reading of *Harper & Row* to its logical conclusion, in the case of *all letters* mailed, this "dissemination" would tip the balance in favor of pre-publication use. This *cannot* be a correct reading of *Harper & Row*, given the language in that decision, relied on by the Court of Appeals, as follows:

> "This argument [that fair use could permissibly be made of Ford's unpublished memoirs because imminent publication demonstrates no interest in non-publication] *assumes that the unpublished nature* of the copyrighted material *is only relevant to letters* or other confidential writings *not intended for dissemination*." 471 U.S. at 554 (emphasis supplied).

As the Court of Appeals concluded:

> "Pertinent to our case is the fact that the Court underscored the idea that unpublished letters normally enjoy insulation from fair use copying." Pet. App. 10.

The *Harper & Row* Court also specifically focused on the requirement of *authorization* of the dissemination: "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's [right of first publication]." 471 U.S. at 551. Petitioners do not and cannot contend that Salinger *authorized* Sublette's use. This fundamental requirement of authorization derives from common law copyright.[14] As stated by a leading 19th-century commentator:

> "The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights. . . . He may admit one or more persons to its use, to the exclusion of all others; and in doing so, he may restrict the uses which shall be made of it." Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions* 102-03 (1879) (hereinafter "Drone").[15]

Thus, "although an author's intent will not be given controlling weight against the effect of his acts, nevertheless *the acts which constitute publication must be voluntary* and not performed under compulsion." Nimmer, §4.13[D] at 4-75 (emphasis supplied). *See also Dowdey v. Phoenix Films, Inc.*, 199 U.S.P.Q. 579, 582 n.10 (S.D.N.Y. 1978).

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[14] *See Palmer v. DeWitt*, 47 N.Y. 532 (1872), cited with approval in *Ferris v. Frohman*, 223 U.S. 426, 434 (1912); *Stanley v. CBS*, 35 Cal. 2d 653, 221 P.2d 73, 78 (1950); *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P.2d 546, 552 (1959).

[15] These principles have consistently been applied to letters. *See* Drone, *supra* at 105, 127 citing *Thompson v. Stanhope*, Amb. 737 (1774). That letter writers retain control over first publication, regardless of unauthorized release after transmission "was judicially recognized as early as 1741, when Curl, the London bookseller, was enjoined from selling a volume containing the private correspondence of Pope and Swift . . . " *Id.* 127-28.

Finally and most critically, the Sublette Bibliography cannot shield Hamilton's use because the nature of Hamilton's "taking" is substantially different from the "taking" in the Sublette Bibliography, as Hamilton himself readily conceded. A.198. While both are unauthorized, the extent of the dissemination of the Letters in a popular biography will far outdistance the limited dissemination of a scholarly bibliography. And Hamilton readily admitted that while his *quotation* of Salinger in the Revised Galleys is limited to those materials quoted in Sublette, his *use* of the Letters (including his paraphrase) goes far beyond Sublette's use. A.199.

C. *Petitioners' Myopic View of the First Amendment*

In a further effort to transform this case into something other than a four-corner application of the *Harper & Row* principles and to avoid the "pedestrian reportage" Hamilton so loathes, petitioners decry a "direct collision" with First Amendment values if this Court permits "the use of copyright in this case to suppress speech." Pet. 15, 21. The preliminary injunction here is in no sense infirm simply because it restrains "expression."[16] The First Amendment protects the *right* to speak (and the right *not* to speak). The copyright law protects the *form* of speech, whether published or unpublished. These protections are not mutually exclusive. This case presents no more than a garden-variety application of the balance traditionally drawn between copyright and free speech interests, as petitioners themselves concede ("prior restraints in copyright have been routinely issued on a finding of liability" [Pet. 20]).

The co-existence of the First Amendment protection of free speech and the copyright law provisions preventing usurpation of intellectual property is grounded in the "idea/expression dichotomy," *i.e.*, while copyright may not be claimed in an idea,

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[16] "The Copyright Act specifically authorizes a federal court to 'grant temporary and final injunctions . . . ' 17 U.S.C. §502(a). Preliminary injunctions are a common judicial response to the imminent infringement of an apparently valid copyright." *Dallas Cowboys Cheerleaders, Inc. v. Scorecard Posters, Inc.*, 600 F.2d 1184, 1187 (5th Cir. 1979).

it may be claimed in an author's original *expression* of an idea. That dichotomy has for decades been regarded by courts and commentators as "an acceptable definitional balance." Nimmer, §1.10[B] at 1-76, 1-77; *accord, Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

In *Harper & Row*, this Court "for the first time explicitly considered competing copyright and First Amendment rights" (Nimmer, §1.10[B] at 1-78.1) and endorsed this idea/expression dichotomy as a mechanism "permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556. Acknowledging that "the Framers intended copyright itself to be the engine of free expression", the Court held that the protection of free speech required by the First Amendment was "already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable fact and ideas." *Id.* at 558-59.

That "First Amendment values" require an exception to the "ordinary circumstances" rule was expressly argued and rejected in *Harper & Row*. Respondents there argued that "their copying of Mr. Ford's expression [is] essential to reporting the news story"; "not only the facts contained in Mr. Ford's memoirs, 'but the precise manner in which [he] expressed himself was as newsworthy as what he had to say' [citation omitted]." *Id.* at 556. The Court flatly rejected this argument: "[t]he fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." *Id.* at 557.

While acknowledging the "routine" issuance of injunctions upon a finding of copyright infringement, petitioners protest this particular routine application, intoning that prior restraints have been held to be "the least tolerable infringement on First Amendment rights." Pet. 20. Petitioners' citation (*id.*) to the "Pentagon Papers" case, *New York Times Co. v. United States*, 403 U.S. 713 (1971) to buttress this argument, fails to point out that copyright was not at issue there. To the contrary, two of the

concurrences specifically identified copyright as one of the areas in which prior restraints pass constitutional muster:

> "[C]opyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed." 403 U.S. at 726 n. (Brennan, J., concurring).
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> * * *
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> "The Congress has authorized a strain of prior restraints against private parties in certain instances. . . . Article I, §8, of the Constitution authorizes Congress to secure the 'exclusive right' of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another [citations omitted]". *Id.* at 732 n.1 (White, J., concurring).

The above statements are in accord with Nimmer's conclusion that, in the area of copyright, *both* parties to a controversy are articulating a right to voluntary self-expression; when infringement is found, the balance must tip toward plaintiff, since "[o]ne who pirates the expression of another is not engaging in *self*-expression in any meaningful sense." Nimmer, §1.10[B] at 1-76.

Not only does the First Amendment neither grant Hamilton a license to pirate expression nor insulate him from an injunction against doing so, but because the Letters are unpublished, petitioners can hardly lay sole claim to First Amendment protection.[17] Salinger's interest in controlling first publication and

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[17] Particularly where plaintiff's work is *unpublished*, courts have never found the potential damage outweighed by defendant's commercial interests. In *Birnbaum v. U.S.*, 588 F.2d 319, 326 (2d Cir. 1978), the Second Circuit held: "[T]he common law copyright [in private Letters] is, in essence, *a right of first publication* [citations omitted] *which of necessity includes the right to suppress any publication by injunction.*" (emphasis added). *See also, Frederick Chusid & Co. v. Marshall Leeman & Co.*, 326 F. Supp. 1043, 1064 (S.D.N.Y. 1971); *In re Ryan's Estate*, 188 N.Y.S. 387, 389 (Surrogate's Ct. N.Y. Co. 1921).

his corresponding right *not* to publish, themselves pose potent First Amendment concerns. *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 778 (1968), upon which petitioners rely, explicates this principle:

> "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."

See also Harper & Row, supra, 471 U.S. at 559 (citing above passage from *Hemingway* with approval); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Schnapper v. Foley*, 667 F.2d 102, 114 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982) ("The First Amendment interests . . . are not based upon a desire for pecuniary gain, but upon the author's freedom to speak or remain silent as an end in itself"); Nimmer, §13.05[A] at 13-74.

Petitioners' attempted equation of their own (substantially commercial) interests with the public interest is, therefore, misleading. First, petitioners' claim to a monopoly on the public interest is singularly myopic as it suggests that publishers are the only ones entitled to seek the mantle of First Amendment protection and ignores altogether Salinger's constitutional and statutory right to speak when — and if — he chooses. Abrogation of this right cannot be redressed by money damages. To circumvent the presumption of irreparable injury that arises as the result, petitioners resort to arguing that Salinger's motivation is suspect, *i.e.*, that his true interest in asserting his rights is one of privacy, rather than copyright. But *Harper & Row* makes clear that the right of first publication protects several distinct interests, including a privacy interest.

Second, although petitioners wax eloquent on the public's interest in the knowledge to be gained from biographies, they ignore the equally important public interest in safeguarding the

free flow of information available to scholars and libraries. If Hamilton's cavalier disregard for the unambiguous terms of the library agreements that permitted him access to the Letters is sanctioned, there will be a chilling effect upon those who have made -- or might consider making -- private correspondence available to libraries and scholars, with express conditions on access to and the right to use such documents.

The Court of Appeals' opinion makes clear that what petitioners have taken from Salinger's Letters is *not ideas*. What petitioners have taken is *not fact*. What they have taken is Salinger's *original expression*. The injunction does not prevent Hamilton from learning or reporting about Salinger's life; it restrains Hamilton from excessive use of Salinger's own words to describe it, and should cause no more of a "direct collision" with the First Amendment than has been experienced in myriad earlier cases. Contrary to petitioners' dire prediction, *i.e.*, ("[t]he decision of the Court of Appeals imperils the writing of all biography" [Pet. 11]), no real "threat" exists to either biography or historical scholarship, as no injunction against dissemination of fact -- historical or otherwise -- has been issued.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
August 28, 1987

Respectfully submitted,

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APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the united [sic] States Court of appeals [sic], in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 28th day of May one thousand nine hundred and eighty-seven.

JEROME D. SALINGER a/k/a J.D. SALINGER

Plaintiff-Appellant.

v 86-7957

RANDOM HOUSE, INC., and IAN HAMILTON

Defendants-Appellees.

A petition for rehearing filed herein by counsel for the appellees Random House, inc [sic] and Hamilton [sic] and the panel that heard the appeal having denied said petition for rehearing in a published signed opinion filed May 4, 1987.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

No. 87-188

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

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No. 87-188

IN THE

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RANDOM HOUSE, INC. and IAN HAMILTON,

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JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS IN SUPPORT OF THE PETITION

REASONS FOR GRANTING THE WRIT

At the heart of respondent's brief is an attempt to persuade this Court that this case presents no issue worthy of the Court's review because this Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (hereinafter "*Harper & Row*"), supposedly addressed all the issues to be resolved. In the court below, however, respondent represented that "[t]his case presents novel questions on which there is little authority with respect to the scope of fair use of unpublished letters" (Brief of Plaintiff-Appellant at 2-3) and that

it involved "very difficult and real issues." (Reply Brief of Plaintiff-Appellant at 2) Respondent's earlier position is the correct one. As the Petition for Certiorari demonstrated and as nothing in respondent's brief refutes, this case presents questions well deserving of this Court's plenary review.

I.

The Court of Appeals' Prohibition on the Fair Use of Technically Unpublished Letters is a Serious Distortion of Copyright Law That Threatens Historical Scholarship

Respondent's brief entirely ignores the central policy question raised by this case — whether historians and biographers may make fair use of letters deposited and publicly displayed in libraries.[1] There is no doubt that, in the practice of their craft, responsible scholars have routinely quoted such sources, relying on the doctrine of fair use. *See* M. Benedict, *Historians and the Continuing Controversy Over Fair Use of Unpublished Manuscript Materials*, 91 Am. Historical Rev. 859, 863-64, 870 (Oct. 1986); Brief Amicus Curiae of Organization of American Historians at 3; Brief Amici Curiae of Kenneth S. Davis, John Hersey, A.E. Hotchner, Justin Kaplan, J. Anthony Lucas, and Ralph Martin at 14-17 (hereinafter "Biographers' Amicus Brief"). And there is no doubt that the Court of Appeals has now effectively prohibited this longstanding practice in holding that "[unpublished] works normally enjoy *complete* protection against copying *any* protected expression." (Pet'n App. A13 (emphasis added)) Indeed, this absolutist language seemingly forecloses scholars from reporting even the briefest quotations from — or paraphrases of — historically significant expression for the full term of United States copyright.

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[1] For the most part, Hamilton's biography does not directly quote from the letters deposited with the libraries. (Pet'n App. A23) However, the biography does quote certain of the excerpts from the library letters that have previously been published in the Sublette bibliography and elsewhere. (*Id.*)

The understanding of the scholarly community prior to this case regarding the use of unpublished materials is concisely summarized in a document entitled "Manuscript Copyright and Permission to Quote," distributed by the Manuscript Division of the Library of Congress.

> "Although the [Copyright] Act does not define the full limits or extent of fair use, it has been generally assumed that it permits the inclusion of brief quotations from unpublished manuscripts in scholarly and research publications."

The *Salinger* ruling is flatly inconsistent with this longstanding practice, one previously supported by cases such as *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 279 N.Y.S.2d 51 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).[2]

Nowhere in his brief does respondent address the propriety of the Court of Appeals' blanket restriction on copying technically unpublished but publicly disseminated letters. Mr. Salinger now instead argues that the Court of Appeals' opinion should be affirmed because this case is controlled by — and involves a rather routine application of — *Harper & Row*. In fact, the distinctions between *Harper & Row* and this case are both numerous and fundamental:

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[2] Respondent's argument that the *Hemingway* case did not involve the fair use of unpublished materials (*see* Resp. Br. at 11 n7) is mistaken and is based upon a misreading of the case. *See* 3 M. Nimmer, *Nimmer on Copyright* § 13.05, at 13-62 n2 (1987) (noting that fair use of unpublished works was expressly upheld in *Hemingway*); Note, *Copyright and Privacy Protection of Unpublished Works — The Author's Dilemma*, 13 Colum. J. L. & Soc. Probs. 351, 377 (1977).

Harper & Row	*Salinger*
The Ford Memoirs had been kept strictly confidential by their author, and were the subject of signed confidentiality agreements.	The letters were available in libraries for the public to read, and excerpts from many of the letters had previously been published in a scholarly bibliography and in newspapers and magazines.
Plaintiff was seeking only money damages.	Plaintiff is seeking and has obtained a prior restraint barring the publication of a biography of an important public figure.
Defendant had knowingly obtained and copied a purloined copy of the Ford Memoirs.	Hamilton did exactly what biographers are supposed to do; he ferreted out previously overlooked materials that had been deposited in libraries expressly for the purpose of scholarly research.[3]
The plaintiff demonstrated clear and quantifiable damages in the form of the cancellation by *Time* magazine of a contract for first serialization rights.	There was no evidence whatsoever of any damage to the value of the copyrighted work; the District Court expressly found that there was no damage; even the Second Circuit conceded there could at worst be only slight damage.

[3] Respondent's repeated reference to the library request forms signed by Mr. Hamilton is the reddest of red herrings. (*E.g.*, Resp. Br. at 3, 13, 24) Neither the District Court nor the Court of Appeals found that Hamilton had breached any duty he may have had to the libraries, and those forms played no part in the ruling of the Court of Appeals. (Pet'n App. A43-A44, A20)

The author had an interest in retaining creative control over the manuscript until it was published.	Salinger relinquished creative control over his letters when he dropped them in the mailbox.
Defendant had quoted the qualitative heart of the Ford Memoirs — the description of the Nixon pardon.	The District Court found that Hamilton had not taken the heart of the letters; and Salinger himself admitted that no one part of the letters was any more important than any other part.

The fact that the letters were disseminated is an especially important distinction between this case and *Harper & Row*.[4] As the legislative history of the Copyright Act indicates, House Comm., on Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision — Part 2: Discussion and Comments on Report of the Registrar of Copyrights on General Revision of the U.S. Copyright Law*, 27 (Comm. Print 1963) (cited with approval in *Harper & Row*, 471 U.S. at 552), "[t]he rational and meaningful distinction, for fair use purposes, is between 'undisseminated' and 'disseminated' works." Biographers' Amicus Brief at 13. While respondent appears to argue that dissemination is irrelevant unless "voluntary" (Resp. Br. at 17-18), this argument simply ignores the fact that Mr. Salinger voluntarily mailed and thus disseminated these letters to their recipients. The recipients of the letters or their estates then further disseminated

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[4] As this Court observed in *Harper & Row*, dissemination amounts to *de facto* publication. 471 U.S. at 551-53. All of these letters have been "published" in the broad, original meaning of the word — they have been made available to the public. Portions of many letters have also been "published" in the traditional copyright sense of the word, having previously been quoted in the Sublette bibliography, *Story* magazine, *Philadelphia Sunday Bulletin*, and elsewhere. (*See* Pet'n at 5 n4) Respondent also argues that the publication in 1984 of the Sublette bibliography, which quoted 971 words from 36 of the Salinger letters, is not relevant to the issue of fair use. (Resp. Br. at 17-18) But the Sublette bibliography indisputably resulted in dissemination of the letters, further tipping the balance in favor of a finding of fair use.

these letters by lawfully depositing them in research libraries where the public is welcome to read them. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.04, at 5-32-33 (1987). Despite the fact that the very purpose of donating the letters to libraries was to make them readily available to scholars, Salinger insists that when it comes even to brief quotation or paraphrase, these letters are forbidden fruit.

The issues at stake in this case have immense, immediate, and continuing practical importance. While *Harper & Row* involved a rare instance of unauthorized access to an unpublished manuscript, this case involves the everyday occurrence of a scholar quoting unpublished but publicly available source materials. Any case that so changes previously understood law and practice to make such materials off-limits is well worthy of consideration by this Court.

II.

The Court of Appeals' Overly Expansive View of Expression Impermissibly Included the Report of Facts and Ideas

Respondent ostensibly takes no issue with the proposition set forth in *Harper & Row* that the law is "currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression," 471 U.S. at 548. Respondent nonetheless contends that what is at issue in this action is the application of "clear legal principles" regarding the definition of paraphrase "to the narrow facts of this case." (Resp. Br. at 15) Even a cursory examination of the decisions of the two courts below demonstrates the fallacy of this argument.

At his deposition, Mr. Hamilton explained the efforts he made to avoid impermissible paraphrase of the Salinger letters:

> "I had to think of these letters as being, as it were, literary works. Works by him, as if they were poems by him, say. Were I to take a poem by J.D. Salinger

> and I wished to report on the content of that poem or the ideas that it contained or the factual materials that lay within it, I would have to make certain that I didn't borrow from anything that was distinctively poetic. In other words, that which would make the poem a poem. That is literary devices that were peculiarly his devices. I had to keep that in mind constantly so that the work that I was writing was a different work. It was a work by me and not by him.
>
> * * *
>
> "The idea was not to quote his letters, as I understood it, because he didn't want his letters quoted and so it seemed to me that I still wanted to make use of the materials that were in the letters and I have a right to do so as biographer. It was in some respect important to my tale that I did." (C.A. App. Vol. II at 270-71)

Regrettably, the Court of Appeals misapprehended what Hamilton clearly understood. The Court of Appeals evidently confused the permissible report of facts contained in the letters with the copying of expression either by quotation or close paraphrase that can constitute an infringement, unless excused as a fair use.

Although the District Court meticulously identified each and every example of what it deemed to be impermissible paraphrase, the Court of Appeals spoke only in the vaguest of generalities. *See* Biographers' Amicus Brief at 20. As respondent has admitted, the Court of Appeals' approach to the paraphrase question was "I know it when I see it." (*See* Resp. Br. at 16) But the court made no effort whatsoever to articulate the principles it was applying. Five of the six examples of impermissible paraphrase cited by the Court of Appeals had already been classified as paraphrase by the District Court and discussed by that court under the doctrine of fair use. (*Compare* Pet'n App. A4-A5 n2, A18 n5 *with id.* A27-28 *and* Text Comparison at 5, 9)[5] With

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[5] The reference to the "Text Comparison" is to the color-coded exhibit made part of the record by the Court of Appeals that reflected a detailed analysis by the District Court of allegations of infringement. (*See* Pet'n at 8 n6)

respect to the sixth example (discussed at page 17 of the Petition), Hamilton did not copy Salinger's expression, but merely reported his idea.[6] The Court of Appeals did not discuss any examples of what it deemed to be errors on the part of the District Court in its handling of the idea-expression dichotomy. Thus, repondent is incorrect that there is no dispute about the legal definition of "paraphrase." (Resp. Br. at 15) The difference between reporting on facts and ideas and the close paraphrase that is the legal equivalent of quotation is both at issue here and sharply disputed between the two lower courts. In addition, because of the lack of definition in the Court of Appeals' decision, future biographers are left without a clue as to how they can accurately report upon the factual content of unpublished letters without running the risk of an injunction.[7]

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[6] Salinger wrote: "I suspect that money is a far greater distraction for the artist than hunger." Hamilton reported that Salinger believed, "Money, on the other hand, is a serious obstacle to creativity." The Petition focused on this example precisely because this was the one instance in which the Court of Appeals identified as paraphrase a passage which the District Court had characterized in the color-coded exhibit as a report of fact. (*See* Pet'n at 8 n6)

[7] In denying the petition for a rehearing, the Court of Appeals observed for the first time (and without a single example) that Hamilton's offense was tracking the "combination of ideas" in the Salinger letters. (Pet'n App. A48) But the Court of Appeals failed to recognize that, for the most part, Salinger's letters retell the events in his life in the chronological sequence in which they occurred. Of necessity, any biographer would be required to retell those events in the same order and Mr. Salinger can hardly be deemed to have a copyright interest in this natural sequence. Judge Learned Hand forcefully made this point in *Myers v. Mail & Express Co.*, 36 C.O. Bull. 478, 479 (S.D.N.Y. 1919):

> "[N]ot only are all the facts recorded in a history in the public domain, but, since the narration of history must proceed chronologically, — or at least, such is the convention, — the order in which the facts are reported must be the same in the case of a second supposed author."

III.

The Copyright Clause and the First Amendment do not Permit Enjoining a Scholarly Biography to Prevent Brief Quotation from Letters

Respondent has simply overlooked one significant question raised in the Petition: whether the construction of the Copyright Act adopted by the Court of Appeals is consistent with the Copyright clause of the Constitution, Art. I, Sec. 8, cl. 8. We repeat our view that to enjoin a scholarly biography that makes incidental use of letters cannot be said to promote "the progress of science and useful arts." (Pet'n at 19-20)

While ignoring this issue, respondent suggests that First Amendment values are not even implicated in this case. (Resp. Br. at 20-24) Yet in previously reported cases in which plaintiffs have attempted to block the appearance of a biography on copyright grounds, the courts have expressly considered the serious threat to free speech posed by a prepublication injunction and ultimately declined to issue a prior restraint. *See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973); *Estate of Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 268 N.Y.S.2d 531 (Sup. Ct. N.Y. Co.), *aff'd mem.*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966). The failure of the Court of Appeals even to consider the First Amendment implications of the prior restraint it was directing the District Court to enter is a significant departure from previous cases.[5]

Respondent and the Court of Appeals suggest that the First Amendment has no relevance because Hamilton can report the

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[5] The Court of Appeals also omitted all discussion of the public interest favoring publication of biographies, despite the fact that the public interest is always a factor to be considered when a plaintiff is seeking injunctive relief. *See, e.g., Yakus v. United States*, 321 U.S. 414, 440-41 (1944); *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962 (9th Cir. 1983).

ideas in Salinger's letters as long as he does not come close to the expression therein. (Resp. Brief at 20-21; *see* Pet'n App. A19) Judicial experience with the idea-expression dichotomy, however, suggests that the line between an idea and the way it is expressed is extremely difficult to draw. *See Harper & Row*, 471 U.S. at 548. That being so, First Amendment values at least require that when the extraordinary remedy of injunctive relief is sought, care be taken to assure that sufficient breathing room remains to avoid the twin perils of censorship and self-censorship. By effectively forbidding quotation, by defining paraphrase so broadly as to imperil the most mundane recitation of facts, by permitting the routine issuance of injunctions on speech of serious social and educational value (Pet'n App. A40), the Court of Appeals has left biographers no leeway at all.

CONCLUSION

The Court of Appeals' holding in this case has already begun to stifle the preparation of new works of biography and history. Review by this Court is necessary to restore to biographers and historians the ability to make productive use of the publicly available source materials that are essential to their craft. For the foregoing reasons, and for the reasons set forth in the Petition, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
September 21, 1987

Respectfully submitted,

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AUG 26 1987

No. 87-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

vs.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF ORGANIZATION OF AMERICAN HISTORIANS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF AMICUS CURIAE

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No. 87 - 188

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OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

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v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE

The Organization of American Historians ("OAH") hereby respecttully moves for leave to file the attached brief amicus curiae in this case. The consents

of the attorneys for petitioners Random House, Inc. and Ian Hamilton have been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the OAH in this case arises from the fact that the OAH is the leading professional organization for scholars involved in the study of United States history. Since its members regularly research, write and publish scholarly articles and books on historical subjects, frequently drawing material from unpublished copyright protected sources, the OAH is necessarily concerned with the scope of the fair use doctrine.

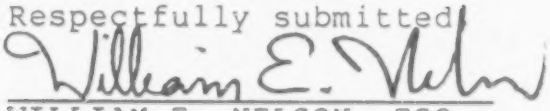
The OAH requests permission to file its brief amicus curiae in its position as the representative of professional American Scholars. Due to its position, the OAH is able to view this particular case from a broader perspective in that the OAH is particularly familiar with the effects that the Second Circuit's interpretation of the fair use doctrine would have on non-parties - specifically American researchers and scholars. If the arguments of the OAH are accepted, this Court will issue a writ of certiorari to review the opinion of

the United States Court of Appeals

for the Second Circuit.

Dated: New York, New York
August 21 , 1987

Respectfully submitted,



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BRIEF AMICUS CURIAE OF ORGANIZATION OF AMERICAN HISTORIANS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF ORGANIZATION OF AMERICAN HISTORIANS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Interest of the Organization of American Historians

The Organization of American Historians ("OAH"), which has its executive offices at 112 North

Bryan Street, Bloomington, Indiana 47401, represents approximately 8,700 individual members and 3,500 institutional members. Founded in 1907, the OAH is the leading professional organization for scholars involved in the study of United States history. The OAH also publishes the journal of record in this subject area -- The Journal of American History. The individual members of the OAH are largely engaged in teaching and research at colleges and universities throughout the United States, although numerous independent scholars are members as well. Many individual members regularly research, write and publish scholarly articles and

books on historical subjects. In the course of their work, these members frequently draw material from unpublished, copyright protected sources and often quote or paraphrase such materials, in reliance on the doctrine of fair use. Thus, the scope of the fair use doctrine is of vital concern to many of OAH's members.

Because its individual members are both copyright owners and scholars who draw on unpublished copyrighted material, OAH has a vital interest in seeking review of the lower court's decision, which if left undisturbed would upset the proper balance between the Copyright Act and the First Amendment.

We support the petition for certiorari, but do not here take up the "merits." Petitioners have consented to the filing of this brief; Respondent has refused consent.

Argument: Reasons for Granting the Writ

The Executive Board of the Organization of American Historians wishes to express concern over the reasoning of the United States Court of Appeals for the Second Circuit in its decision in the case of Jerome D. Salinger v. Random House, Inc. and Ian Hamilton, decided January 29, 1987.

American researchers have traditionally enjoyed broadly construed rights to paraphrase

large portions and to quote significant segments of unpublished manuscript materials deposited in scholarly libraries and archives open to the public, under the doctrine of "fair use" of copyrighted material.

The Second Circuit's interpretation of the "fair use" doctrine in Salinger swings so far in the direction of copyright protection that, if allowed to stand, it would severely limit the historical use of archival manuscript material. The Salinger theory of fair use would have a potentially chilling effect on scholarly publication in the United States.

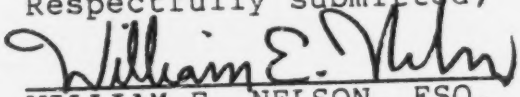
It is not our understanding that the Congress intended (in the Copyright Act of 1976) to change the time-honored American rules of professional behavior for historical researchers.

Conclusion

We believe that the scholarly community will join us in urging that the traditionally broad, yet legally and morally responsible, rule of "fair use" be restored. The issue is one of great legal and practical importance. For the foregoing reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
August 21, 1987

Respectfully submitted,



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No. 87-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,
Petitioners,

v.

JEROME D. SALINGER a/k/a J. D. SALINGER,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for petitioners has been obtained, but counsel for respondent has refused consent.

The AAP is a trade association of book publishers in the United States. Its approximately 250 members publish books accounting for 70-75% of the dollar volume of all books published in this country. These include a great many historical works, biographies of public figures, and other works that, following the great traditions of scholarship, must rely upon reasonable quotation and paraphrase of letters and other "unpublished" documents deposited in libraries and archives (or with other third parties).

Additionally, all AAP members have a direct interest *both* in the protection of their works by copyright and the creation and dissemination of scholarly and popular works that make

fair use of others' copyrighted works. A properly balanced fair use doctrine is essential to the entire publishing community.

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the AAP submitted a brief *amicus curiae* that sought reversal of the Court of Appeals' over-expansive application of fair use to unpublished *and undisseminated* works. The AAP position was reflected in this Court's opinion reversing the decision below.

In this case, the Court of Appeals purported to follow the principles established in *Harper & Row* and advocated by the AAP. The attached brief will show, however, that the Court of Appeals misconstrued these principles. It thereby inhibited the creation of all works of history, biography, and the like that rely on letters and similar primary research materials, and endangered the delicate relationship between copyright law and the First Amendment provided by a balanced fair use doctrine.

The AAP seeks to demonstrate that the Court should grant certiorari in order to restore the proper fair use balance and to remove the chill to scholarship and publishing caused by the Court of Appeals' decision. The AAP also specifically seeks to demonstrate that particular sections of the Copyright Act, allocating prerogatives among writers of letters, owners of copies of those letters, and the public compel reversal of the Court of Appeals' decision.

Many AAP members publish fewer books per year than petitioner. They can ill afford the litigation, let alone the injunction, that would follow if they sought to publish scholarly works that used technically unpublished, but accessible, research sources. Copyright policy has traditionally permitted fair use of such materials. The effect of the Court of Appeals' decision to the contrary has spread substantial uncertainty throughout the publishing community.

To present its views as to why this Court should grant certiorari in this important copyright case, the AAP moves for leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

THE INTEREST OF *AMICUS CURIAE*

The Association of American Publishers, Inc. ("AAP") respectfully submits this brief *amicus curiae* in support of the petition of Random House, Inc., and Ian Hamilton for a writ of certiorari.

The AAP is a trade association of book publishers in the United States. Its approximately 250 member companies and subsidiaries publish between 70% and 75% of the dollar volume of all books published in the United States. These publications include historical works and biographies and autobiographies of public figures, virtually all of which are based at least in part on letters and other documents that are both protected by copyright and available for fair use by scholars.

Publishers have a direct and compelling interest in both the protection against appropriation of literary property guaranteed by § 106 of the Copyright Act and the privileges fostering the harvest of knowledge and the publication of scholarly historical and biographical work guaranteed by § 107—the Copyright Act's fair use provision. The Second Circuit's decision has disturbing implications for the creation and publication of biographies and scholarly works of history.

INTRODUCTION AND SUMMARY OF ARGUMENT

The fair use doctrine, now codified in 17 U.S.C. § 107, expressly shelters publishers and scholars whose works draw on primary source materials. The statute provides that a prime purpose of fair use is to advance "criticism, comment . . . scholarship [and] research," and legislative history specifically endorses the "quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations" as a core example of fair use. H.R. Rep. No. 1476, 94th Cong., 2d Sess., 65 (1976); S. Rep. No. 473, 94th Cong., 1st Sess., 61 (1975). The Court of Appeals threatened this legislative purpose when it gave too little weight to this vital consideration, and decisive weight to the technically unpublished nature of the disseminated letters.

Despite acknowledging that under *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), fair use is applicable under "special circumstances" to "unpublished works," *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987), the Court of Appeals held that unpublished works "normally enjoy complete protection against copying. . . ." 811 F.2d at 97. But Mr. Salinger's letters are unpublished in the technical sense only. They have been disseminated to university libraries, where they have been available to interested readers. Acting under the express policies and provisions of the Copyright Act, the recipients lawfully lodged the letters at university libraries; the libraries made the letters accessible to scholars; and a scholar—Ian Hamilton—made reasonable use

of the letters consistent with scholarly tradition and copyright policy. The *availability of the letters for scholarly research* is precisely the "special circumstance" that renders incorrect the holding below that the letters are completely insulated against fair use under *Harper & Row*. The Copyright Act does not grant Mr. Salinger a right to impose his reclusiveness on the owners of his letters, on those to whom his letters have been disclosed, or on the public.

The scholarly use of unpublished but disseminated letters of literary figures like Mr. Salinger, or of men and women of comparable historical or political interest, reaches far beyond the mere chronicling of dry facts and events to which the Court of Appeals' decision has confined it. Such scholarly work has in the past extended, and must continue to extend, to the discernment, consideration and effective presentation of the qualities of mind, thought, style and expression that make great artists and political figures worthy of serious study in the first place. *See generally* L. Edel, *Literary Biography* (1957). The Court of Appeals' contrary judgment, enforced through the unjustified remedy of a prior restraint, should be reviewed and reversed by this Court.

REASONS FOR GRANTING THE WRIT

A properly balanced application of the fair use doctrine is of vital importance to publishers.

In *Harper & Row* the AAP, as *amicus curiae*, opposed the defendant's *overly-expansive* fair use claim, emphasizing that President Ford's memoirs were neither published in the technical sense nor disseminated, disclosed, or available in any practical way. The Association stressed that President Ford's memoirs were being groomed for imminent publication, and that Harper & Row's copyright claim was not being pressed to suppress the disclosure of public information. The AAP urged that the Second Circuit's decision misconceived the relationship between copyright and the First Amendment and sanctioned serious interference with the publishing process.

Here, the Second Circuit's acceptance of Mr. Salinger's *overly restrictive* reading of fair use with respect to his disseminated (and only technically unpublished) letters poses analogous dangers. An important function of the fair use provision in the Copyright Act is to serve as a safety valve to accommodate the First Amendment and copyright. By virtually eliminating fair use for disseminated materials that have been lodged in university and other libraries, and are only technically unpublished, the Second Circuit has severely constricted the fair use doctrine's ability to serve that function. The judgment below threatens the interests not only of AAP members, but of all who write and read biographies, histories, autobiographies, and similar non-fiction works and of the public. It warrants this Court's attention.

I.

THE COURT OF APPEALS' UNDUE EMPHASIS ON THE TECHNICALLY UNPUBLISHED NATURE OF THE ACCESSIBLE LETTERS MISCONSTRUES THIS COURT'S DECISION IN HARPER & ROW, THE POLICIES OF THE COPYRIGHT ACT, AND FAIR USE DOCTRINE

The letters Mr. Hamilton used in writing his biography of Mr. Salinger were lawfully lodged with research libraries at Harvard, Princeton, and the University of Texas, and were lawfully available there for use by scholars.[1] *See* 17 U.S.C. § 202 (distinguishing between owner of copyright—here, Mr. Salinger—and owner of the material object—here, the recipients of his letters or libraries); 17 U.S.C. § 109(a) (owner of letters entitled "without the authority of the copyright owner" to dispose of possession); 17 U.S.C. § 109(c) (owner of letters entitled "without the authority of the copyright owner" to display them publicly).

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[1] "Most, if not all" of the letters used by Mr. Hamilton are in the three university libraries. *Salinger v. Random House, Inc.*, *supra*, 811 F.2d at 93. The panel did not distinguish between those letters that are held by private individuals and those more widely available in the libraries. In any event, the governing principle remains the same: the recipients of the letters were entitled to disclose and display them.

The Court of Appeals misconstrued *Harper & Row* when it ignored these facts, and applied a sterile fair use doctrine that it erroneously believed was applicable to all works that are technically unpublished.

This Court held in *Harper & Row* that "[*u*]*nder ordinary circumstances,* the author's right to control the first public appearance of his *undisseminated* expression will outweigh a claim of fair use." 471 U.S. at 555 (emphases added). But the Court also stressed that:

> [t]his absolute . . . rule . . . [has always been] tempered in practice by the equitable nature of the fair use doctrine. In a given case, factors such as implied consent through de facto publication or performance or dissemination of a work may tip the balance of equities in favor of prepublication use.

471 U.S. at 551 (citing authorities).

Both the Court's analysis and the authorities on which it relied were consistent with the AAP brief, which stressed both the Association's own position and the legislative intent from the earliest discussions of copyright revision that "fair use *should* apply to disseminated or disclosed, but technically unpublished works." AAP Brief *Amicus Curiae, Harper & Row v. Nation Enterprises,* at 10 n.7 (emphasis supplied); *see also id.* at 9 n.6 (exemption from narrow application of fair use for "disclosed but unpublished works"). Variations upon this theme of "disseminated but unpublished" works were a principal consideration behind this Court's and the legislative reports' cautionary use of "ordinary circumstances." *See Harper & Row, supra,* 471 U.S. at 551.

The accessibility of letters such as Mr. Salinger's for scholarly use at research libraries renders them precisely the "disseminated but unpublished" works to which the "narrower scope" of fair use for unpublished works described in *Harper & Row* does not apply.

That Mr. Salinger is reclusive and that he might not have intended letters he wrote to be disclosed and accessible in research libraries does not affect the application of fair use to these disseminated materials.[2] Sections 202 and 109 of the 1976 Act, in tandem, refute any claim that the Copyright Act grants the authors of letters the right to impose their reclusiveness on letter owners, on those to whom the letters have been disclosed, on scholars or on the public. The affirmative policies of the Act these provisions embody—balancing among the rights of the copyright owner, the rights of the owner of the material object in which the copyrighted material is embodied, and the public—deny precisely that right. Mr. Salinger would deny access to those who cannot individually *visit* the libraries. This only emphasizes that authors must be permitted to make "fair use" of pertinent quotations from these publicly available research materials for the benefit of the interested public and in furtherance of the policies of both the Copyright Act and the First Amendment. Review of the decision below is necessary to correct the Court of Appeals' misapplication of applicable law and this Court's decision in *Harper & Row*.

II

THE COURT OF APPEALS' UNDUE EMPHASIS ON THE TECHNICALLY UNPUBLISHED NATURE OF THE LETTERS JEOPARDIZES THE PREPARATION AND PUBLICATION OF SCHOLARLY WORKS OF HISTORY AND BIOGRAPHY

The creation and publication of scholarly works on contemporary historical subjects depends in large measure on the collections of letters and papers in our nation's great research libraries. The Court of Appeals' mis-reliance on the holding of *Harper & Row*, exacerbated by its unprecedented prior restraint, will irreparably interfere with that work.

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[2] Some of the letters were even more widely accessible. A bibliography of source material on Mr. Salinger published by Garland Press listed and quoted from letters in Princeton's collection.

Letters have served a time-honored special function as primary source material for biographical scholars. *See Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841); *Estate of Hemingway v. Random House, Inc.*, 449 Misc.2d 726, 728, 268 N.Y.S.2d 531, 534 (Sup. Ct. 1966), *aff'd*, 25 App. Div. 2d 719, 269 N.Y.S.2d 366 (1966). Biographers and historians must undertake the duty of unearthing and effectively utilizing letters and private papers lodged in libraries—the contemporaneous, raw materials of their craft—unless they are merely to rewrite from published works, or subject themselves to the control of those they write about.

The Court of Appeals unjustifiably restricted the "latitude for scholarship and comment traditionally afforded by fair use," *Harper & Row v. Nation Enterprises*, 471 U.S. at 560, when it held that, apart from the bare "facts" recited in the letters and its erroneous restriction of fair use, any "[p]ublic awareness of the expressive content of the letters will have to await either [an author's] decision to publish or the expiration of his copyright. . . ." *Salinger v. Random House, Inc., supra*, 811 F.2d at 100. Section 109(c) of the Copyright Act already authorizes the very "public awareness of the expressive content of the letters" the Court of Appeals sought to deny. And section 107 permits critics, for example, to do more than mention the "facts" embodied in "unpublished" but publicly performed or disseminated works of drama or spoken poetry or works of nonfiction—they may reasonably quote, paraphrase, and comment on brief passages from literary works. There is no basis for affording authors any lesser latitude with regard to disseminated, publicly available research materials.[3]

Because the Second Circuit encompasses a great part of the publishing industry in the United States, its decision will have an immediate and far-ranging inhibiting effect. Authors and publishers will inevitably tend to engage in self-censorhip, steering clear of any paraphrase or quote from materials in

[3] Far from being hostile to the use of unpublished archives and library research collections, Congress provided a special exemption from the Act's copying restrictions to permit the provision of entire copies of such materials to other institutions for scholarly work. 17 U.S.C. § 108(b).

research libraries. The Court of Appeals' erroneous understanding of *Harper & Row* should be reviewed for this reason alone.

But that necessity for review is magnified by the prior restraint the Court of Appeals ordered, in the form of a preliminary injunction that has already lasted more than seven months. Prior restraints on publication have generally been held inimical to the Constitution except in extraordinary circumstances. *Near v. Minnesota*, 283 U.S. 697, 712-20 (1931); *New York Times Co. v. United States*, 403 U.S. 713 (1971). This Court has not yet addressed the standards that should govern the question of prior restraints in copyright cases. This case provides an appropriate opportunity to do so.

The Court of Appeals' issuance of a prior restraint based upon its cramped construction of the fair use provision as it applies to research materials in libraries and archives turned the Copyright Act into the very engine for the suppression—not advancement—of information against which this Court warned in *Harper & Row, supra*. See 471 U.S. at 558-59. Absent this Court's review, the decision below will have a harmful impact well beyond Mr. Hamilton's biography of Mr. Salinger.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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NO. 87-188

IN THE
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JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

ON WRIT OF CERTIORARI
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BRIEF OF AMICI CURIAE KENNETH S. DAVIS, JOHN HERSEY, A.E. HOTCHNER, JUSTIN KAPLAN, J. ANTHONY LUKAS, and RALPH G. MARTIN, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ON WRIT OF CERTIORARI
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THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE

Kenneth S. Davis, John Hersey, A.E. Hotchner, Justin Kaplan, J. Anthony Lukas and Ralph G. Martin respectfully move for leave to file the annexed brief amici curiae supporting the petition for a writ of certiorari. They are authors of works of biography, history, and social and

political reportage.

These authors are concerned that the Court of Appeals' denial of fair use with respect to "unpublished" letters, and its inhibitive definition of "expression", will unduly hamper reasonable use of such copyrighted works for normal biographical, historical and scholarly purposes. Since these issues are profoundly important to these amici and many other authors they seek leave to file the attached brief which advances additional reasons for granting the petition. Petitioners have consented to the filing; Respondent has ~~not replied to~~ refused our request for consent.

Respectfully submitted,

IRWIN KARP
Attorney for amici curiae
Davis, Hersey, Hotchner,
Kaplan, Lukas and Martin

August 28, 1987

QUESTIONS PRESENTED

1. Are legally disseminated and accessible letters insulated from fair use by biographers and historians because those writings are, in Copyright Act parlance, "unpublished"?

2. Did the Court of Appeals employ an unduly restrictive definition of copyright-protected "expression" that denies biographers, historians, and similar authors the right to use ideas, facts and other information that actually are not protected by the Copyright Act? copyright?

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NO. 87-1880

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JEROME D. SALINGER, a/k/a J.D. SALINGER,

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BRIEF OF AMICI CURIAE KENNETH S. DAVIS, JOHN HERSEY, A.E. HOTCHNER, JUSTIN KAPLAN, J. ANTHONY LUKAS, and RALPH G. MARTIN, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Amici curiae are authors who have written works of biography, history and political and social reportage, some of which are listed in Appendix A.

Because "unpublished" letters, journals and the like are indispensable resource materials for biographies, histories and similar books, these amici are very concerned that the Court of Appeals' denial of fair use with respect to unpublished letters will sharply restrict reasoonable use of these materials for biographical, historical and scholarly purposes.

Amici adopt and incorporate here those portions of the Random House-Hamilton petition setting forth the opinions below, the jurisdictional grounds, the constitutional and statutory provisions involved, and also the petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

The Court of Appeals conclusion that "fair use" normally does not apply to "unpublished" letters (although lawfully

disseminated and made accessible to authors) is based on a talismanic view of the copyright term "publication" which is totally inconsistant with the House Judiciary Committee's opinion that "publication" is an artifical, obscure and defective concept. H. Rept.94-1476, at 129*. Given this fundamental inconsistency, the sound reasons for allowing fair use of such materials, and the devestating consequences of not doing so, amici curaie believe the Court should grant the petition for certiorari, and review this question, which has far-reaching consequences for American biographers, historians, scholars and other authors.

Amici curiae also urge that the Court review the Court of Appeals' highly restrictive definition of

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* 94th Cong., 2d Sess. (1976); U.S. Code Cong. & Admin. News (1976) 5666

copyright-protected "expression" which, they submit, will severely impede the right of biographers and historians to report facts, ideas and information although these materials are not protected by copyright.

The amici curaie agree with petitioners that the Court should review a third question: Whether the prior restraint on Ian Hamilton's work of original authorship-- not a pirated version of a prior work -- violates the First Amendment by denying his right to publish facts and other information, and his views and opinions concerning J.D. Salinger and Salinger's writings.

I.

THE COURT OF APPEALS ERRED IN RULING THAT FAIR USE NORMALLY DOES NOT APPLY TO UNPUBLISHED LETTERS

1. The Court of Appeals and District Court agreed that facts, ideas and information in J.D. Salinger's letters are not protected by copyright and could be used by Ian Hamilton in his biography. (As this indicates, copyrights are not weapons reclusive authors can use to prevent unauthorized biographies or unwanted publication of ideas and information they have disclosed to others.)*

But the Court of Appeals' held that fair use normally does not apply to unpublished letters, albeit lawfully disseminated and accessible. This ruling

*Suits for invasion of privacy, not copyright infringement actions, test whether unauthorized biographies invade rights of privacy and whether First Amendment protection under Time,Inc. v. Hill, 385 U.S. 374 (1967) and its progeny bars such a claim in a given case.

will hamper biographers and historians by preventing their use of limited quotations and paraphrasings from that material to give readers essential insights and understanding, to illustrate their analyses, and for other purposes that "fair use" permits for "published" letters.

2. The Court of Appeals agreed that Hamilton's biography plainly satisfied the first fair-use criterion: i.e., it "fits comfortably within" several of the fair-use categories -- i.e., "criticism", "scholarship" and "research" -- so that he had a legitimate fair-use purpose in quoting Salinger or otherwise drawing on his protected "expression." (App. A-10).

The fourth and most important fair use criterion is the effect of Hamilton's borrowing on Salinger's potential market for his letters. While the Court of Appeals said "this fair use factor weighs

slightly in Salinger's favor" (App. A-18), its analysis, we submit, indicates the contrary. The Court agreed that Hamilton's book could not displace the market for a future edition of Salinger letters, and conceded that "most potential purchasers of a collection of the letters would not be dissuaded by publication of the biography." (App. A-17)

Actually, no adverse market effect could occur. Only a small part of 44 letters, by either Court's count, were quoted or paraphrased. And even the 44 letters, in their entirety, would be a small part of a printed volume containing "collected letters"; indeed, such books often include 400, 500 or more pages.*

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*e.g.: LETTERS OF F. SCOTT FITZGERALD, Charles Scribners & Sons, 1963; 615 pp. HENRY JAMES, LETTERS: VOL.3 (1983-1895), Belknap Press, 1980; 579 pp. SELECTED LETTERS OF ROBERT FROST, Holt, 1964, 466 pp.

The passages in dispute, a mere drop in such a large bucket, would not diminish the audience of readers who might buy a volume of Salinger's letters, or dissuade libraries who are principal purchasers of published volumes of "collected letters." And, the passages in dispute did not, therefore, endanger Salinger's right of "first publication" of his letters.

3. While these two important fair use factors would not, we submit, bar Hamilton's limited quotes and paraphrases, the Court of Appeals decided that Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), required the conclusion that "unpublished" works -- here, the Salinger letters -- "normally enjoy complete protection against copying any protected expression" (App. A-13), thus precluding any fair-use quotation or paraphrasing of "protected expression."

This exclusionary rule would prevent biographers or historians from quoting or paraphrasing copyright-protected expression from unpublished letters of living or deceased public officials, scientists, artists, business executives, authors, generals, or other subjects of public interest, even though the letters lawfully had been dissimeinated and made accessible to biographers, historians and scholars.

By contrast, had the letters been "published", in the technical copyright sense ("the distribution of copies ... to the public" [Sec. 101]), biographers and historians concededly could quote from and paraphrase "protected expression " within the limits allowed by fair use.

4. We submit the Court of Appeals erred, and that J.D. Salinger's unpublished letters were subject to the

limited quoting and paraphrasing of copyright-protected material which biographers, historians and scholars are permitted under the fair-use doctrine.

Since, the Salinger letters automatically became copyrighted works on January 1, 1978 under section 303 of the new Copyright Act (Title 17), they were subject to its fair use provisions (Sec. 107.) In light of the House Judiciary Committee's Report on the 1976 Copyright Act, there is no basis for "normally" excluding "unpublished" copyrighted works from the reach of fair use. The House Report said that "publication" possibly was the most important concept under the 1909 Copyright act and "also represents its most serious defect" (emphasis added.) H.Rept. 90-1476, at p. 130. It said that in earlier times when works usually

were disseminated by distributing printed copies, "publication" could serve as a dividing line between common law and statutory protection, but that as means of dissemination multiplied, "the concept of publication has become increasingly artificial and obscure." id. at 130.

It is most artificial to permit or prohibit fair-use quotation or paraphrasing of letters depending on whether they are "published" or "unpublished." A collection of letters, issued in a small printing, may be disseminated to only a few people and then become inaccessible by going out-of-print.* The letters, nonetheless are "published" and therefore are subject to fair use for the duration of their copyrights.

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*Indeed, a work can be "published" by distribution of one or a few copies (H. Rept. at 138), and that "pubilcation" would expose it to fair use.

While "publication" may not truly make a work public, "unpublished" letters of a president (or author) in a library may be disclosed and disseminated lawfully to hundreds of persons who can read them, and the letters remain accessible for decades to biographers, historians, scholars and journalists.

The rational and meaningful distinction, for fair use purposes, is between "undisseminated"and "disseminated" works. Harper & Row had not disseminate its Ford Memoirs at the time the Nation copied from them; rather, Harper & Row took precautions to prevent disclosure, and the Nation used a "purloined" manuscript.

On the other hand, Mr. Salinger's letters were voluntarily dissemniated by him to their recipients ... who lawfully

deposited them in three University libraries ... which lawfully made them available to biographer Hamilton and others who used those collections. As Professor Nimmer makes clear, recipients of letters are entitled, no less than bookstores, to disclose their contents to others, and to deposit the letters in libraries which can lawfully disclose their contents to individuals by allowing them to read the letters. NIMMER ON COPYRIGHT (1985), Sec. 5.04, at 5-32,33.

This process of disseminating letters, which makes them lawfully accessible to biographers and historians, was well established long before Mr. Salinger launched his correspondence with Judge Learned Hand, Whit Burnett and others. The editor of George Bernard Shaw's 1874- 1897 letters noted, for example,

> "... though Shaw must have been aware even before the turn of the century that his letters were being saved and would one day receive public scrutiny, there is never in them an element of self-consciousness, an awareness that the world is reading over his shoulder."

BERNARD SHAW: Collected Letters, Vol. I, 1874-1897, at. xi; Dodd, Mead; 1965.

A more contemporaneous example of the common practice:

> "Most of Dylan Thomas's letters by now have found their way into American University libraries, in particular those of Harvard*, New York State (Buffalo) and Texas*. All those libraries or rather their librarians, have been most helpful in allowing me to see his letters, some of which I quote." Constantine Fitzgibbon, THE LIFE OF DYLAN THOMAS, at vii; Little, & Co., 1965

Amici respectfully submit that the Court should grant certiorari and consider whether fair use applies to lawfully disseminated unpublished letters.

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*Whose collections also house various of the Salinger letters.

II

THE COURT OF APPEALS' DEFINITION OF "EXPRESSION" UNDULY INHIBITS USE OF LETTERS BY BIOGRAPHERS AND HISTORIANS

1. As the District Court stated, letters "play an important role" in the writing of biography. App. A-36. Leon Edel, eminent biographer of Henry James, noted that the "pioneer" biography of Thackeray would have been impossible without his letters, and that while James "burned his papers in a great bonfire in his garden", James' biography could nonetheless be written because he could not feed the fire with "thousands of letters which had reached others' hands..." Leon Edel, WRITING LIVES; W.W. Norton, 1984, at 22.

Biographers, historians and scholars must be able draw on these materials for facts and information, and quote from them to provide insights, understanding,

and the basis for criticism and analysis. Wallace Stevens' biographer said that "at every turn" the poet's letters "provide(s) insights into and confirmation of the background of his poetry and thought." Samuel French Morse. WALLACE STEVEN: POETRY AS THOUGHT; Pegasus, 1970, at xiii.

2. Amici curiae believe that the Court of Appeals has imposed a severe restraint on biographers' and historians' use of these indispensible source materials through its unduly inhibitive standard for determining whether given passages of a book permissably report facts and information, or impermissably use the letter writer's protected "expression" and therefore "infringe". (Having excluded Salinger's letters from "fair use" because they were unpublished, the Court nonetheless analyzed the "sub-

stantiality" of their use by Hamilton under the third fair use criterion.)

The District Court had found 200-300 words of direct quotation; between 0.8% and 2.0% of the letters. App. A-23. While it thought the biography drew substantially on the letters, the District Court found that "the vast majority of the material taken by Hamilton is not copyright protected" since it consisted of information about Salinger, his ideas and thoughts - "vital historical fact..." App. A-25.

The District Court held that infringement occurs where the second author oversteps "permissable limits by taking the author's craftsmanship", or "image", or "literary device", or "metaphor", or "choice of words." App. A-27, A-29. The District Court counted as infringements the passages in which

Hamilton took such protected material by direct quote or paraphrase. But it found these were limited to 30 instances in which a word, phrase or image was taken; and they were not the "heart of Salinger's letters, nor of Hamilton's book." App. A-35, A-36.

The Distict Court's opinion gave many examples of passages in the book which it held to be permissable use of facts, ideas and other unprotected information; and several examples of passages it considered to appropriate Mr. Salinger's protected expression by direct quotation or paraphrase.

3. The Court of Appeals sharply disagreed. It held that Hamilton had appropriated Salinger's expression in many more passages. It said that protected "expression" includes "'the author's analysis or interpretation of events, the way

he structures materials and marshals facts, his choice of words and the emphasis he gives to particular developments.'" App. A-15, quoting from Wainright Securities, Inc. v. Wall Street Transcript Corp., 558 F.2d 91, 95-96 (2d Cir. 1977).

Unlike the District Court's opinion, the Court of Appeals' opinion provides little practical guidance. Its analysis of the disputed passages is not illustrated by concrete examples. Attorneys who counsel biographers, historians and their publishers will find in it only generalities -- broad statements which lead to puzzlingly different results in different Circuits, and panels.

Biographers and historians need clearer guidance. And while quantitive tests are not available, the chilling effect on legitimate use of biographical and historical

resources, under the vague expression-fact/information test can be reduced by opinions that amply illustrate the court's application of principles with enough examples from the two works -- as the District Court's opinion provided and the Court of Appeals' opinion did not.

The Court of Appeals' observations on the nature of protected expression clash sharply with its prior opinions in such cases as Hoehling v. Universal City Studios, Inc., 618 F. 2d 972 (2d Cir. 1980) where it bluntly rejected the idea that copyright protected such elements as the structuring or selection of facts.

Indeed, in Hoehling, the Court gave very short shrift to copyright protection for biographers and historians, saying that the "scope of copyright in historical accounts is narrow indeed" and that "broad latitude .... and a relatively

free hand" must be granted to subsequent authors to make use of their works. (618 F.2d at 978, 980). Amici do not agree with those conclusions; structure and selection of facts are very much a part of biographers' and historians' creative craftsmanship, essentials of their copyrightable expression.

The Second Circuit seems more willing to recognize that in works involving considerably less craftsmanship -- e.g., Wainwright Securities ,Inc. The effect of Salinger is to warn biographers and historians they run great risk in using facts, ideas and other information found in letters -- although they do not appropriate the prior author's language -- because a court may later declare they appropriated the "association" or "combination" or "sequence" or "arrangement" of unprotected ideas and thoughts contained

in the letters.

The Court of Appeals thus swings the pendulum from one extreme (very narrow protection for highly structured works such as biography and history) to the opposite extreme (very broad protection for less structured and fragmentary materials such as letters.) The Court of Appeals overemphasized "structure" and similar elements to create a much higher degree of protection for short, unrelated works such as the individual letters in a library collection, each of which contains a few facts, ideas, and images phrases. Yet, in reporting some of these, with minimal literal quotation, a biographer or historian does not appropriate the "structure" of the collection or the individual letter.

A second biographer impermissably appropriates a prior biographer's "express-

ion" when, in Judge Story's words "the labors of the original author are substantially appropriated to an injurious extent", Folsom v. Marsh 9 F. Cas. 342, 348 (No.4,901) (CC Mass.)

A second biographer can, by substantially appropriating a predecessor's structure and other elements make him an unwilling co-author of the second work -- providing much of the effort and craftsmanship required to produce a biography, "labors" the second author avoided by the appropriation. The type of use Hamilton and countless other biographers have made of their subjects' letters does not have that effect. Hamilton did the creative work that constitutes the craftsmanship and expression of a competent, professional biographer. He did not commandeer Salinger as an unwilling co-biographer.

4. This Court has noted that the law is unsettled as to the ways in which uncopyrightable elements combine with an author's original contributions to form protected expression. Harper &Row v. Nation Enterprises, 471 U.S. at 548.

The uncertainty of the law in this area is vividly exemplified by the conflicting opinions of the District Court and Court of Appeals. Amici curiae and countless other biographers and historians are handicapped and threatened by that uncertainty, and therefore amici urge the Court to grant certiorari and review this question.

CONCLUSION

Amici curiae respectfully urge that the petition for certiorari be granted.

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Respectfully submitted,

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APPENDIX A

For identification, two of each amici's several works are listed. (We have not listed the Pulitzer, National Book Award and other prizes some of them have won.)

Kenneth S. Davis:

... FDR: THE BECKONING OF DESTINY Random House, 1985.

... FDR: THE NEW DEAL YEARS; Random House, 1986.

John Hersey:

... ASPECTS OF THE PRESIDENCY; Ticknor and Fields, 1980.

... HIROSHIMA; A.A. Knopf, 1946

A.E. HOTCHNER:

... PAPA HEMINGWAY; Random House, 1966.

... CHOICE PEOPLE; Morrow, 1984.

Justin Kaplan:

... MR. CLEMENS AND MARK TWAIN; Simon & Schuster, 1966.

... WALT WHITMAN; Simon & Schuster, 1980.

J. Anthony Lukas:

... COMMON GROUND; A.A. Knopf, 1985

... DON'T SHOOT - WE ARE YOUR CHILDREN; Random House, 1971

RALPH G. MARTIN:

... JENNIE (2 vols.): THE LIFE OF LADY DIANA CHURCHILL, Prentice Hall, 1969.

... A HERO FOR OUR TIME: AN INTIMATE PORTRAIT OF THE KENNEDY YEARS; Macmillan, 1983.